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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

MOBILETEL, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When a federal agency adopts a new analytical approach to determining whether a regulated entity falls into an existing regulatory classification, such as eligibility for licenses issued by the agency under its regulations, which approach causes substantial, irreparable harm to applicants deemed to be ineligible, does this Court's decision in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company*, 463 U.S. 29 (1983) and its progeny require the agency to at least acknowledge and support the departure with a reasoned explanation on the administrative record?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

MobileTel, Inc., petitioner here, was the appellant in the Court of Appeals; the Federal Communications Commission was the appellee. BellSouth Mobility, Inc. and Columbia Cellular, Inc. intervened in the Court of Appeals on the side of the Federal Communications Commission.

The parent company of MobileTel, Inc. is SJI, Inc. MobileTel, Inc. has no nonwholly owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, MobileTel, Inc., respectfully prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The March 7, 1997 Opinion of the Court of Appeals for the District of Columbia Circuit is reported at 107 F.3d 888 and is reprinted in the Appendices hereto ("App."), Appendix A at 1a. The April 29, 1997 Order of the Court of Appeals for the District of Columbia Circuit denying rehearing is not reported and is reprinted in Appendix D at App. 47a.

The August 14, 1996 Memorandum Opinion and Order of the Federal Communications Commission, FCC 96-345, is not reported and is reprinted in Appendix B

at App. 16a. The October 11, 1990 Memorandum Opinion and Order of the Mobile Services Division of the Federal Communications Commission is reported at 5 FCC Rcd 5854 and is reprinted in Appendix C at App. 38a.

JURISDICTION

The judgment of the Court of Appeals was entered on March 7, 1997. The Court of Appeals denied a timely petition for rehearing on April 29, 1997. The jurisdiction of the Court of Appeals was based on 47 U.S.C. § 402 and 28 U.S.C. § 2342(*l*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(*l*).

REGULATORY PROVISION INVOLVED

47 C.F.R. § 22.902(b) (1988):

> For cellular systems the assignment of frequencies will be divided into two blocks. Assignments will be made from the frequencies lists for cellular Systems A and B. Common Carriers not also engaged in the business of affording public landline message telephone service will be assigned frequencies from Cellular [sic] System A. Common carriers engaged directly or indirectly in the business of affording public landline message telephone service will be assigned frequencies from cellular System B in those areas in which they provide such landline services in some portion of the cellular market . . . .

STATEMENT OF THE CASE

A. Jurisdiction in the Court of First Instance

The Court of Appeals had jurisdiction under 47 U.S.C. § 402 and 28 U.S.C. § 2342(*l*) to review the final order of the Federal Communications Commission (FCC or "Commission") in this case.

B. Introduction

Lafourche Telephone Company ("Lafourche") is a family-owned local telephone company that has provided

basic telephone service and other telecommunications services in rural southeastern Louisiana for more than 50 years. Lafourche currently serves approximately 12,500 business and residential subscribers in four parishes along the lower Mississippi River. MobileTel, Inc. ("MobileTel"), petitioner herein and appellant below, is an affiliate of Lafourche established in 1988 to provide cellular telecommunications services in Lafourche's telephone service areas.

In 1990, MobileTel was awarded cellular authorizations to serve two Rural Service Areas ("RSAs"), labeled RSA No. 8—St. James and RSA No. 9—Plaquemines. These licenses were reserved for carriers providing "public landline message telephone service" in these RSAs. MobileTel premised its eligibility for these licenses on its provision of telephone service in the relevant service areas using a newly authorized radio-based telephone technology known as "Basic Exchange Telecommunications Radio Service" ("BETRS"), and the FCC's licensing division initially affirmed MobileTel's eligibility upon challenge. Six years later in review of this licensing decision, the FCC rescinded the cellular licenses, worth millions of dollars, reversed the earlier decision of its licensing division, and held that use of equivalent radio technology to provide telephone service was insufficient to support eligibility for the set-aside licenses.

In adopting the set-aside of cellular licenses for providers of "public landline message telephone service" in 1981 and in subsequent interpretations, the Commission made clear, again and again, that these licenses would be available to any party providing local telephone service in any portion of a cellular service area. The Commission did not then, or at any point in the intervening 15 years leading up to its August 1996 decision, make any eligibility distinctions based on the technology used to provide local telephone service. To the contrary, a long line of FCC precedent, both in the cellular licensing context and otherwise, firmly established that the FCC has determined

whether a carrier provides "public landline message telephone service" or "wireline service" by reference to the type of service provided—telephone service—or type of service provider—in this case, a telephone company. The Commission's decision rescinding MobileTel's licenses did not even acknowledge this change in the Commission's interpretive approach, and so did not set forth a reasoned explanation for the change. The Court of Appeals, in upholding the Commission's decision, simply found that the Commission's interpretation was not clearly wrong, and did not require any explanation for the change.

The Wireline Set-Aside for Cellular Licensees. In 1981, the FCC set-aside two blocks of spectrum, denominated A and B, to be licensed for commercial cellular service. *See An Inquiry into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems*, Report and Order, 86 FCC 2d 469 (1981) ("*Cellular Communications Systems*"), *recon. granted in part and denied in part*, 89 FCC 2d 58 (1982), *on further recon.* 90 FCC 2d 571 (1982). The blocks were complementary: Block A was reserved for "Common Carriers not also engaged in the business of affording public landline message telephone service," whereas Block B licenses were reserved for "Common carriers engaged directly or indirectly in the business of affording public landline message telephone service . . . in some portion of the cellular market" for which they were seeking a cellular license. 47 C.F.R. § 22.902(b) (1988). The Commission allotted two mutually-exclusive blocks of spectrum to each area in order to serve several policies. First, the Commission sought to meet "the immediate need for [cellular] service to the public. . . ." *Cellular Communications Systems*, 86 FCC 2d at 493. Telephone companies already providing basic local telephone service in the cellular market were considered to have the expertise and resources necessary to develop such systems expeditiously, so Block B was allocated exclusively to them. This reservation came to be known as the "wireline set-aside." The separate frequency

block reserved for entities that did not provide basic local telephone service in a market ensured that there would be competition in the provision of cellular service. *Id.* at 474.

In justifying its finding that the expertise of incumbent local telephone companies would expedite the introduction of cellular service, the FCC observed that "much of the successful research and development in the mobile field over the years has come from wireline carriers." *Id.* at 488. The Commission also noted that the "independent telephone companies, and not just AT&T, had expertise . . . in traffic engineering and establishment of high capacity local switching networks[, which] will also be important to the rapid establishment of cellular communication systems." *Id.* at 489 n.48. In adopting the wireline set-aside, the Commission did not define who was and was not "in the business of affording public landline message telephone service" for purposes of its eligibility criteria, but simply referred to "telephone companies" and companies which provide "local telephone service."

Provision of Basic Telephone Service Through BETRS Technology. MobileTel's telephone company affiliate, Lafourche, provides telephone service in Louisiana through a local telephone network consisting of both traditional wireline facilities and BETRS. Traditional wireline telephone service is generally provided through three major components, consisting of

> the local loops or lines which connect each customer to the local telephone company Central Office switch, the Central Office or End Office switch itself, and the trunks which are used to interconnect the various Central Offices within the local area or region.[1]

[1] Hatfield Associates, Inc., *An Engineering Analysis of the Method Used by the Lafourche Telephone Company to Provide Basic Switched Telephone Service in Louisiana* ("Hatfield Analysis"). The Hatfield Analysis was included in the record of the proceedings before the FCC and the Court of Appeals.

In 1988, in response to concerns over the ability of local exchange carriers to provide efficient telephone service to rural areas and areas suffering from harsh terrain where wire or cable is often prohibitively expensive to install and maintain, the Commission "expand[ed] fixed service options" for the provision of local telephone service by establishing BETRS.[2] With BETRS, the carrier was permitted to substitute a radio loop for one of the components of telephone service: the wire that connects the customer to the local telephone company's central office switch. *BETRS Order*, 3 FCC Rcd at 214; *see* 47 C.F.R. § 22.2 (defining BETRS). As the Commission noted, "BETRS is provided so that radio loops can take the place of (expensive) wire or cable to remote areas. It is intended to be an extension of basic exchange service."[3]

The wireline set-aside rule preceded the establishment of BETRS by seven years, and was not revised at the time that BETRS was established or before MobileTel applied for its licenses to serve the RSAs.

Lafourche adopted BETRS technology because some of the customers in its service areas reside in remote wetland

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[2] *Basic Exchange Telecommunications Radio Service*, Report and Order, 3 FCC Rcd 214, 215 (1988) (establishing BETRS) (*"BETRS Order"*), *on recon.*, 4 FCC Rcd 5017 (1989) (*"BETRS Recon Order"*); *see also BETRS Order* at 216 (carriers intend to use BETRS to serve areas "with substandard telephone service, no telephone service, or those in danger of losing affordable telephone service due to harsh climate which can lead to extensive repair requirements and rapid deterioration of plant").

[3] *BETRS Order*, 3 FCC Rcd at 217; *see BETRS Recon. Order*, 4 FCC Rcd at 5017 (noting the "basic exchange nature of [BETRS] service"); *Amendment of Parts 2 and 22 of the Commission's Rules to Permit Liberalization of Technology and Auxiliary Service Offerings in the Domestic Public Cellular Radio Telecommunications Service*, Report and Order, 3 FCC Rcd 7033, 7041 (1988) ("BETRS . . . is intended to be an extension of basic exchange service in areas where there is inadequate or no basic exchange telephone service offered.").

areas which are difficult to reach by wire or cable facilities, making the provision of telephone service through this means impractical. Lafourche's innovative use of BETRS was consistent with prevailing trends in the telephone industry as a whole, which extensively uses non-wire radio technology throughout local telephone plant. BETRS customers receive service indistinguishable from traditional telephone service using wires.

C. MobileTel's Application and FCC Proceedings

In October 1988, MobileTel applied for the wireline Block B cellular licenses to serve the St. James and Plaquemines Rural Service Areas. MobileTel's eligibility for these licenses was based on provision by its telephone company affiliate, Lafourche, of basic telephone service in these parishes using BETRS.

In 1989, following a lottery, MobileTel was named the tentative selectee for both licenses. *Applications of MobileTel, Inc.*, Memorandum Opinion and Order, 5 FCC Rcd 5854 (Mobile Servs. Div. 1990) ("MSD Order"), App. 38a. Shortly thereafter, two unsuccessful applicants for these licenses, BellSouth Mobility, Inc. ("BellSouth") and Columbia Cellular, Inc. ("Columbia"), intervenors before the Court of Appeals, filed petitions to deny MobileTel's applications on the ground, *inter alia*, that provision of BETRS does not constitute the provision of public landline telephone service required to qualify for a Block B wireline license. *Id.*, App. 39a-40a. In October, 1990, the Mobile Services Division of the FCC's Common Carrier Bureau concluded that MobileTel was qualified because its affiliate is "indisputably a wireline carrier which provides basic exchange telephone service" in the St. James and Plaquemines parishes. *Id.* at 5855, App. 44a. Accordingly, the Mobile Services Division granted MobileTel the authority to construct and operate cellular systems in both RSAs. *Id.* at 5856, App. 45a-

46a. BellSouth and Columbia filed petitions for reconsideration of the MSD Order.

MobileTel constructed its system and commenced service to the public in 1992. The remaining challenges to MobileTel's authority were cleared up over the next two years, or so MobileTel believed. BellSouth abandoned its request for reconsideration in 1994, and asked that it be dismissed with prejudice. MobileTel entered into successful settlement negotiations with the only other challenger, Columbia, under which Columbia's petition to deny would be withdrawn, and filed a settlement for approval with Commission staff in June 1994. In February 1995, however, the FCC issued a press release announcing that it had adopted an order in January 1995 rescinding MobileTel's two RSA licenses. *See* "FCC Reverses Bureau Action; Dismisses Applications of MobileTel, Inc. for Wireline Service in Two Louisiana Markets," Report No. CC 95-12 (rel. Feb. 6, 1995). The press release made no mention, however, of the pending request for approval of the MobileTel-Columbia settlement. *See id.* In March 1995, after the pending settlement had been brought to the Commission's attention, it voted unanimously to vacate the January decision and remanded the matter for further consideration.

On August 14, 1996, the Commission again rescinded MobileTel's licenses to serve the St. James and Plaquemines RSAs. *Applications of MobileTel, Inc.*, Memorandum Opinion and Order, File Nos. 10538-CL-461-B-89 and 10539-CL-P-462-B-89 (rel. Aug. 14, 1996) ("August 14 Order"), App. 16a. The August 14 Order concludes, on the Commission's own motion, that MobileTel was not eligible for Block B licenses on the basis of its affiliate's provision of service through BETRS. The Commission based this conclusion on its assertion that the term "landline" used in the phrase "public landline message telephone service" "can[not] be construed 'in context' to encompass services that exclusively use radio technology

in the relevant market." *Id.* at 9, App. 27a. Because landline" is not defined in the Commission's rules or its decisions involving BETRS technology or the wireline set-aside, the Commission purported to identify its plain meaning. *See id.*, App. 27a-28a. The Commission reached this conclusion even though it recognized that, despite the differences in technology used, BETRS service is functionally interchangeable with the local telephone services provided by carriers eligible to apply for Block B frequencies, and that BETRS was intended to be used in conjunction with such wireline services. *Id.* at 12, App. 32a. The Commission did not even recognize, much less explain or distinguish, its prior interpretations looking to the nature of the service, or the nature of the service provider, as the dispositive consideration in determining eligibility for "wireline" set-asides.

D. Disposition in the Court of Appeals

MobileTel filed a timely appeal of the Commission's decision, arguing that the decision was plainly wrong for three reasons: *first*, contrary to the Commission's position, its decision was inconsistent with the "plain meaning" of the entire operative phrase "in the business of affording public landline message telephone service"; *second*, it was flatly inconsistent with the Commission's prevailing approach in interpreting this and similar set-asides, which looked to the nature of the service provided or the type of service provider, rather than the technology of specific components used to provide service; and *third*, it was inconsistent with the policies underlying the wireline set-aside and the policies underlying the Commission's authorization of BETRS as a substitute for wired telephone facilities.

The Court of Appeals appropriately articulated a deferential standard of review:

> When we review a challenge to an agency's interpretation of its own regulations, we will accept the

> agency's interpretation unless it is "plainly wrong." *General Carbon Co. v. Occupational Safety & Health Review Comm'n,* 860 F.2d 479, 483 (D.C. Cir. 1988) (citing *United States v. Larionoff,* 431 U.S. 864, 872 (1977) and *Udall v. Tallman,* 380 U.S. 1, 16 (1965)).

MobileTel, Inc. v. Federal Communications Comm'n, 107 F.3d 888, 894 (D.C. Cir. Mar. 7, 1997), App. 8a. The Court rejected the FCC's basic conclusion that the phrase "public landline message telephone service" was susceptible of a "plain meaning," noting the existence of conflicting definitions in the industry. *Id.*, App. 10a. The Court of Appeals therefore undertook to examine the policies served by the regulation, which included benefiting small local carriers, encouraging experienced carriers, promoting settlements, and minimizing competing applications. The Court of Appeals affirmed the August 14 Order based on its conclusion that the "Commission's construction of the term 'landline' is consistent with several of these policies . . . ." *Id. at* 895, App. 11a.

The Court of Appeals' initial decision simply failed to examine whether the FCC was following its own prior interpretations. Despite Appellant's argument, which forms the basis for the present petition, that the FCC had not adhered to the class-of-service analysis illustrated by its decision in *Xerox Corp. and MCI Communications Corp.,* Memorandum Opinion and Order, 90 FCC 2d 547 (1982) ("*Xerox Corp.*"), and Court of Appeals cited *Xerox Corp.* once, and that time for the proposition that "landline" does not have a plain meaning. Nor did the Court of Appeals discuss whether any of the other FCC orders relevant to the definition of "landline" reveal a service-based or technology-based approach to determining eligibility for cellular set-asides.

Accordingly, MobileTel timely filed a petition for rehearing. MobileTel argued on rehearing that the Court

of Appeals overlooked a critical step, raised in MobileTel's briefs below, in its analysis: Commission decisions must be consistent not only with underlying policies, as the Court of Appeals found, but also with the Commission's own prior precedent, at least in the absence of a reasoned explanation for departure from precedent, citing, *inter alia, Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983). The Court of Appeals denied rehearing on April 29, 1997.[4]

REASONS FOR GRANTING THE WRIT

This case presents an important question concerning the application of *State Farm*, namely the extent to which Article III courts should require federal agencies to provide a reasoned explanation when adopting new or different interpretations of existing regulations. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) ("*State Farm*"). MobileTel demonstrated to the Court of Appeals that the FCC's August 14 Order rescinding cellular licenses issued to MobileTel adopted a markedly different approach to determining eligibility for set-asides of valuable licenses, in this case cellular licenses set aside for entities engaged "in the business of affording public landline message telephone service." 47 C.F.R. § 22.902(b) (1988). In its August 14 Order, the FCC failed even to acknowledge that the

[4] In its two-page opinion denying rehearing, the Court of Appeals asserted that MobileTel had not raised the inconsistency between the approach taken in the August 14 Order and the Commission's prior interpretative statements "until oral argument." *MobileTel, Inc. v. Federal Communications Comm'n*, No. 96-1327, Order at 1 (Apr. 29, 1997), App. 47a. To the contrary, MobileTel's brief spends 11 pages describing the Commission's earlier interpretative decisions and contrasting them with the August 14 Order, in the context of arguing that the Commission's decision was "plainly worng." *See* Am. Br. For Appellant at 5, 19-28. MobileTel's reply brief devotes an additional seven pages to this issue. *See* Rep. Br. For Appellant at 4-8, 13-14.

Order involved such a basic shift in approach. The Court of Appeals, on the other hand, confined its review to the question of whether the FCC's interpretation of this phrase was "plainly wrong," and failed to require an explanation of the agency's shift in approach. Consequently, the Court of Appeals failed to remand the August 14 Order for a reasoned explanation for the new approach, which is required whenever a federal agency such as the FCC "chang[es] its course" without adequate explanation. *See State Farm*, 463 U.S. at 57 (quoting *Greater Boston Television Corp. v. Federal Communications Comm'n*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971)); *Atchison, Topeka & Santa Fe Ry Co. v. Wichita Bd. of Trade*, 412 U.S. 800 (1973). Because BETRS is a "technological alternative within the ambit of the existing" approved methods of providing landline service, *State Farm*, 463 U.S. at 51, the FCC was required to apply the same service-based or provider-based analysis employed in its previous decisions to MobileTel's claim of eligibility based on telephone service that utilizes a BETRS link, or provide a reasoned explanation for not doing so. Clarity is particularly critical in the context of Commission decisions determining eligibility for valuable licenses which are set aside for defined classes of eligible entities. The Commission continues to employ such set-asides, most recently auctioning billions of dollars of spectrum to limited classes of eligible entities.

The Court should grant certiorari, review the decision of the Court of Appeals, and firmly establish that agencies must supply a reasoned explanation not just when they formally announce changes to their rules or policies, as was the case in *State Farm* and *Atchison*, but also when they adopt a fundamentally different approach to interpreting and applying existing regulations.

I.

Basic federal administrative law, which accords wide deference to agency decisionmaking, and which accords

agencies "ample latitude to 'adapt their rules and policies to the demands of changing circumstances,' " requires, at a minimum, reasoned explanations when an agency departs from its prior approach. *State Farm,* 463 U.S. at 42 (quoting *Permian Basin Area Rate Cases,* 390 U.S. 747, 784 (1968)). Courts insist on such an explanation because there is a judicial presumption that an agency's "policies will be carried out best if the settled rule is adhered to." *State Farm,* 463 U.S. at 42 (quoting *Atchison,* 412 U.S. at 808). Accordingly, in order for the Court to complete the task of judicial review, "an agency changing its course must supply a reasoned analysis . . . ." *State Farm,* 463 U.S. at 57 (quoting *Greater Boston Television Corp. v. Federal Communications Comm'n,* 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied,* 403 U.S. 923 (1971)); *see Atchison,* 412 U.S. at 808 (an agency may depart from prior norms for a number of reasons, but "[w]hatever the ground for the departure from prior norms, however, it must be clearly set forth so that the reviewing court may understand the basis of the agency's action . . .").

Although the Court in *State Farm* and *Atchison* did not need to address agency changes that were not "formally" adopted as such, the same concerns with administrative regularity are implicated where an agency revises its view of existing regulations through a basic change in analytical approach as when it formally adopts, revokes or amends a rule or policy. The Court has recognized, for example, that with respect to an agency's interpretation of its own regulations "the case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views." *Pauley v. Beth-Energy Mines, Inc.,* 501 U.S. 680, 698 (1991) (citing *Bowen v. Georgetown Univ. Hosp.,* 488 U.S. 204, 212-13 (1988)); *see Thomas Jefferson Univ. v. Shalala,* 512 U.S. 504, 515 (1994) (an agency's interpretation of its regulations that conflicts with the agency's past position " 'is entitled to considerably less deference' than a con-

sistently held agency view" (quoting cases)). And, as the dissent noted in *Thomas Jefferson University v. Shalala,* even an agency's prior "conduct, no less than express statements, can effect a construction of statutes or regulations," which the Court should examine carefully and demand a reasoned explanation. *Thomas Jefferson Univ. v. Shalala,* 512 U.S. 504, 524 n.3 (1994) (dissent) (citing *State Farm* and *Atchison*). Failure to do so could eliminate the primary safeguard against arbitrary administrative action where judicial review is most deferential.

The Court should make clear that the basic premise, established by a "long line of precedent," "that an agency action is arbitrary when the agency offered insufficient reasons for treating similar situations differently" is not dependent on the manner by which an agency effectively revises its regulations. *Transactive Corp. v. United States,* 91 F.3d 232, 237 (D.C. Cir. 1996) (citing cases). Indeed, it is even more important to demand a reasoned analysis where an agency revises its view of existing regulations without a formal rulemaking procedure, as in MobileTel's case, because such a proceeding does not benefit from the same level of public participation as rulemaking proceedings, which allow for public notice and comment. Moreover, an agency's adoption of a new interpretation of its regulations in the context of an individual case can be extremely prejudicial to the parties of a particular case, who are entitled to act on the presumption that the agency will follow its regulations, policies and precedent. Precisely that happened here: MobileTel reasonably believed, based on long-standing Commission precedent bearing on cellular eligibility and the Commission's Orders in adopting BETRS, that it would be eligible for Block B licenses where it provided service incorporating BETRS. Accordingly, rather than seek the Block A license, which under the reasoning of the August 14 Order MobileTel would have been eligible, MobileTel applied for the Block B license.

The Court of Appeals' failure in this case to require a reasoned explanation of the Commission's departure from its prior interpretations of its regulations is also at odds with the prevailing approach of the Courts of Appeals generally. Thus, the Seventh Circuit has explained:

> If in [*State Farm*], instead of repealing the rule the agency had proclaimed that an ordinary seat belt is a "passive restraint", the Court would have treated this the same as it treated the revocation of the rule. Both require notice, an opportunity for comment, and an adequate record. A change in interpretation announced in administrative adjudication may avoid the formal requirements of notice and comment, but it too requires reasons.

Homemakers North Shore, Inc. v. Bowen, 832 F.2d 408, 412 (7th Cir. 1987) (citing cases). The Fifth Circuit has stated that "any departure from past interpretations of the same regulation must be adequately explained and justified." *Acadian Gas Pipeline Sys. v. Federal Energy Regulatory Comm'n*, 878 F.2d 865, 868 (5th Cir. 1989). In *Acadian Gas*, because of the "practical and tangible effect that the new interpretation [of the regulation] will have" on regulated entities, the Court of Appeals rejected the agency's claim that no *State Farm* departure from past practice had occurred. *Id.* at 869; *see id.* at 868-70 (reversing and remanding case). Likewise, the First Circuit rejected an agency's assertion "that agencies are free to alter their interpretations of their own regulations" without accompanying the "alteration or reversal" with a reasoned explanation.[5] Given the importance of this issue,

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[5] *Citizens Awareness Network v. Nuclear Regulatory Comm'n*, 59 F.3d 284, 291 (1st Cir. 1995); *see, e.g., Seldovia Native Ass'n, Inc. v. Lujan*, 904 F.2d 1335 (9th Cir. 1990) (agency must "provide a reasonable rationale supporting its departure from prior practice"); *Puerto Rican Cement Co., Inc. v. Environmental Protection Agency*, 889 F.2d 292, 298-99 (1st Cir. 1989) (discussing basis of consistency doctrine); *see also Western States Petroleum Ass'n v. Environmental Protection Agency*, 87 F.3d 280, 285 (9th Cir. 1996)

and the appropriateness of this case as a vehicle to decide this issue, the Court should accept certiorari to provide clear guidance to the Courts of Appeal.

Therefore, this Court should accept certiorari to clarify that when an agency departs from prior precedent by changing its analytical approach to interpretation of its own regulations, it must at least acknowledge the change and provide a reasoned explanation on the record. If this Court concludes that *State Farm* is clearly implicated here, then it should grant certiorari because the Court of Appeals, by allowing the FCC to change its course without meeting the standard of *State Farm*, "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). If this Court does not believe that *State Farm* clearly resolves this issue, then it should accept certiorari because "a United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court . . . ." Sup. Ct. R. 10(c).

II.

MobileTel demonstrated below that the Commission's August 14 Order fundamentally changed the criteria for classifying a carrier that is "in the business of affording public landline message telephone service," and analogous regulatory classifications, from the type of service provided, or the type of service provider, to a technical examination of the facilities involved. The Commission's *Xerox Corp.* decision exemplifies the Commission's prior approach. At issue in *Xerox Corp.* was whether a long distance carrier, MCI, was in the "business of public landline message telephone service" under the wireline eligibility rule and hence could not acquire a non-wireline cellular licensee. To resolve the question, the Commis-

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(because agency "depart[ed] from its own prior standards" in applying regulation at issue, Court of Appeals accorded agency no deference in interpretation of regulation).

sion traced the history of that operative phrase back to 1949, but did not resolve the case based upon the technology MCI was using. *See Xerox Corp.*, 90 FCC 2d at 550-54. Rather, it looked at the whole phrase "business of affording public landline message telephone service" and analyzed the business MCI was in. The Commission concluded that MCI was a long distance telephone company, not a local telephone company, and hence was not in the business of affording public landline message telephone service. Here, Lafourche is a local telephone company and is authorized by the Commission to use BETRS as part of the business of providing public landline message telephone service.

In *Xerox Corp*, the FCC also canvassed its precedent beyond cellular eligibility issues and concluded in each case that the distinction between wireline and nonwireline carriers is based on the type of service or provider involved. *See Xerox Corp.*, 90 FCC 2d at 550-54. The FCC first looked at its 1949 decision to allocate separate frequencies for wireline and nonwireline carriers for DPLMRS. *Id.* at 552 (citing *General Mobile Radio Servs.*, 13 FCC 1190 (1949), *recon. denied*, 13 FCC 1242 (1949)). The FCC found that the decision "indicates that the Commission meant that the *telephone companies*, encompassing AT&T and the independents, provided 'public landline message telephone service.' " *Xerox Corp.*, 90 FCC 2d at 552 (emphasis added). Next the FCC looked at its *Guardband* decision from the late 1960s allocating frequencies between wireline and nonwireline carriers for one-way paging services. *Xerox Corp.*, 90 FCC 2d at 552-53 (citing *Allocation of Frequencies in 150.8-162 Mc/s Band*, 12 FCC 2d 841 (referred to as the *Guardband* decision), *recon. denied*, 14 FCC 2d 269 (1968) *aff'd sub nom., Radio Relay Corp. v. Federal Communications Comm'n*, 409 F.2d 322 (2d Cir. 1969)). In *Xerox Corp.*, the FCC concluded that its *Guardband* decision "associated 'public landline message telephone service' with the provision of

local exchange service." *Xerox Corp.*, 90 FCC 2d at 553 (emphasis added). The FCC then looked at its competitive carrier rulemaking from the 1970s and again concluded that the Commission was attempting to use this language to divide the world into "conventional telephone compan[ies]" and everyone else. *Id.* (citing *Policy and Rules Concerning Rates for Competitive Common Carrier Servs. and Facilities Authorizations Therefor*, Notice of Inquiry, 77 FCC 2d 308, 319 (1979)). Finally, the FCC concluded that its cellular decision, which created the cellular eligibility rule at issue here, "is consistent with this interpretation." *Xerox Corp.*, 90 FCC 2d at 553 (citing *An Inquiry into the Use of the Bands of 825-845 MHz and 870-890 MHz for Cellular Communications Systems*, Report and Order, 86 FCC 2d 469 (1981), *recon. granted in part and denied in part*, 89 FCC 2d 58 (1982) ("*Cellular Communications Systems Recon. Order*"), *on further recon.*, 90 FCC 2d 571 (1982).

The *Xerox* approach is very much in evidence in the very FCC decisions adopting the rules at issue in this case. Time and again in describing the wireline set-aside, the Commission equated wireline eligibility with the provsion of basic telephone service, without discussing the mix of facilities employed. *See Cellular Communications Systems Recon. Order*, 89 FCC 2d at 77-78 (repeatedly equating wireline carriers with "telephone companies" and noting that wireline petitioners sought permission "to apply for non-wireline frequencies in areas where they provide no *local exchange service*" (emphasis added)); *id.*, 89 FCC 2d at 71 (describing "expertise of the *independent telephone companies*" eligible for wireline set-aside without any reference to wire-dependent operations (emphasis added)); *Amendment of the Commission's Rules to Allow the Selection from Among Mutually Exclusive Competing Cellular Applications Using Random Selection or Lotteries Instead of Comparative Hearings*, Report and Order, 98 FCC 2d 175, 197 n.64 (1984) (referring to the entity eligible for the wireline set-aside

as the "*telephone company*" or "*independent telephone company*" (emphasis added)); *id.* at 198 n.65 (noting that "wireline presence requirement . . . emphasize[s] the link between *local exchange service* and cellular service" (emphasis added)); *Amendment of the Commission's Rules for Rural Cellular Radio Service*, Order on Reconsideration, 2 FCC Rcd 3366, 3369 (1987) ("wireline set-aside would assure that both large and small *telephone companies* will have an opportunity to participate in cellular service" (emphasis added)); *see also Amendment of the Commission's Rules for Rural Cellular Service*, Order on Reconsideration of Second Report and Order, 4 FCC Rcd 5377, 5381 (1989) (in discussing rationale for certain wireline set-aside rules, Commission notes that "*telephone carriers* have incentive to develop cellular service as an adjunct to their *local exchange* facilities" (emphasis added) (citation omitted)). There is no discussion in the cellular orders that remotely indicates that certain kinds of local telephone companies, *e.g.*, companies that happen to use radio technology to provide subscriber loops, are not eligible for the wireline set-aside.

If the Commission had applied the approach of *Xerox Corp.* and the FCC decisions discussed therein, it would have ended the case in MobileTel's favor, since there is no dispute that Lafourche is a local telephone company that is in the business of providing local telephone service in the relevant service areas. The decisions and the orders adopting the wireline set-aside demonstrate that the August 14 Order abandoned the FCC's decisionmaking approach based on type of service or type of provider and instead adopted a new mode of analysis which focuses on the technology utilized to provide service.

This Court should grant certiorari and establish that agencies must fully account for changes in their regulations, no matter how accomplished. The FCC's failure to explain its fundamental shift in its view of Block B cellular eligibility, indeed even to acknowledge it, is arbitrary and capricious and requires a remand to the agency.

See, e.g., State Farm, 463 U.S. at 57; *Telephone and Data Sys., Inc. v. Federal Communications Comm'n*, 19 F.3d 655, 657 (D.C. Cir. 1994).

CONCLUSION

For the foregoing reasons, MobileTel, Inc. respectfully requests that the Court issue a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 31, 1997 Decided March 27, 1997

No. 96-1327

MOBILETEL, INC.,
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee

COLUMBIA CELLULAR, INC. AND
BELLSOUTH MOBILITY, INC.
Intervenors

APPEAL OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

Before: EDWARDS, *Chief Judge*, WALD and SENTELLE, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WALD.

WALD, *Circuit Judge*: On August 14, 1996, the Federal Communications Commission ("the Commission") released an order dismissing the application of MobileTel, Inc. ("MobileTel") to provide cellular service in two Rural Service Areas ("RSAs") in Louisiana using frequencies reserved for applicants that already provide

"public landline message telephone service," 47 C.F.R. § 22.902(b) (1988), in those areas. *See In re Applications of MobileTel, Inc.*, FCC 96-345, 1996 WL 459977 (F.C.C.) (August 14, 1996). The Commission concluded that MobileTel was ineligible for the reserved frequencies in these RSAs because the company provided telephone service to customers in these areas only by means of radio links, and the regulation making the provision of "public landline message telephone service" a condition of eligibility excluded companies serving customers only by means of radio links. MobileTel appealed the Commission's order to this court. We affirm.

I. Background

The Commission established rules to govern the implementation of cellular communications service in 1981. *See Cellular Communications Systems*, 86 FCC 2d 469 (1981), *modified*, 89 FCC 2d 58 (1982), *further modified*, 90 FCC 2d 571 (1982), *petition for review dismissed, United States v. FCC*, No. 82-1526 (D.C.Cir. 1984). To promote competition in cellular markets, the Commission divided the radio spectrum into two frequency blocks, ensuring that two cellular systems would compete in each market. *See id.* at 487-93. In making its initial allocation of cellular frequencies, the Commission made the "Block A" frequencies in each market available to "[c]ommon carriers *not* also engaged in the business of affording public landline message telephone service," 47 C.F.R. § 22.902(b) (emphasis added), and reserved the "Block B" frequencies for common carriers that *were* engaged directly or indirectly in the provision of "public landline message telephone service." *Id.* The Commission eliminated this system of separate allocations for landline and non-landline applicants in 1994. *See Revision of Part 22 of the Commission's Rules*, 9 FCC Rcd 6513 (1994).

The Commission reserved the Block B frequencies for companies already providing landline service because it wanted to take advantage of the technical expertise and

knowledge of local markets that AT&T and other experienced providers of basic local telephone service had accumulated through years of providing local service. *See Cellular Communications Systems,* 86 FCC 2d at 488-89 ("Given AT&T's distinctive technical capabilities, and its operation in most major markets, we are left with little doubt that only AT&T is in a position today to place cellular systems in operation around the country in the immediate future."). The Commission also hoped in this way to minimize the number of applications competing for the Block B frequencies in each market. Although in previous license distributions it had allowed providers of landline service to qualify for landline set-aside frequencies in *any* market, *see In re Application of Bonduel Telephone Co.,* 68 FCC 2d 497 (1978), the Commission deliberately abandoned the *Bonduel* approach in creating the Block B cellular landline set-aside, deciding instead to permit landline companies to apply for cellular frequencies only in the markets in which they were already providing landline service. *See Cellular Communications Systems,* 86 FCC 2d at 490 n.56. In this way the Commission hoped to guarantee that in all but a few markets, only one wireline carrier would be eligible for the Block B frequencies, which would eliminate the delay caused by the often drawn-out comparative hearings required for dealing with mutually-exclusive applications under *Ashbacker Radio Corp. v. FCC,* 326 U.S. 327 (1945). The Commission also expected that rapid approval of the local landline company's application for the Block B frequencies in a market would give competing applicants for the Block A frequencies in that market an incentive to reach a settlement agreement, to prevent the company operating in the Block B frequencies from getting a head start. *See Cellular Communications Systems,* 86 FCC 2d at 490-91. Except where they threaten its goal of preserving competition, the Commission generally favors measures that streamline the license distribution process—for example by encouraging settlement agreements between competing

applicants—in light of its statutory mandate "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges. . . ." 47 U.S.C. § 151.

When the Commission replaced the comparative hearing system with a lottery system in 1983, it expressly declined to discontinue the set-aside for landline companies operating in the relevant market, despite arguments that the abandonment of the comparative hearing system eliminated the need for set-asides designed to streamline the selection process. *See Cellular Lottery Rulemaking*, 98 FCC 2d 175 (1984), *modified*, *Cellular Lottery Reconsideration Order*, 101 FCC 2d 577 (1985), *affirmed in pertinent part, Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551 (D.C. Cir. 1987). The Commission defended the retention of the landline set-aside on the ground that it continued to promote important goals, notwithstanding the switch to a lottery system. *See id.* at 192-98. First, the set-aside protected local landline telephone companies from being shut out of their local cellular markets. Were they to be shut out of the local cellular market, these companies would lose customers to the local providers of cellular service, especially in rural areas where the cost of providing landline service is high; eventually the local companies could be forced out of business by their cellular competitors. *See id.* at 194-95. Individuals served by these small local telephone companies would then be left without telephone service, an outcome which would conflict with the Commission's objective of achieving universal telephone service. Second, the Commission believed that the separate allocation system lent the cellular markets a structure which would foment healthy competition, since the two types of communications carriers would draw upon their respective "traditions of service" to compete for customers. *See id.* at 196. Third, the set-aside continued to encourage settlement agreements by limiting the number of competing applications, and settlement agreements were still (despite the

obviation of comparative hearings by the introduction of a lottery system) thought to serve the public interest by creating synergies between heterogeneous companies and minimizing the administrative burden, delay, and expense involved in dealing with petitions challenging cellular frequency allocations. *See id.* at 196-97. Fourth, eliminating the set-aside would be unfair to the local telephone companies, because they had previously been precluded by the terms of the set-aside from competing for Block B frequencies in areas where they did not provide landline service. *See id.* at 197.

In October of 1988, MobileTel—an affiliate of Lafourche Telephone Company, Inc. ("Lafourche")—applied for Block B cellular frequencies in the St. James and Plaquemines RSAs in swampy areas on the gulf coast of Louisiana. Competing applications for the St. James RSA were filed by BellSouth Mobility, Inc. ("BellSouth") and Columbia Cellular, Inc. ("Columbia"), and BellSouth also filed a competing application for the Plaquemines RSA. Columbia's (undisputed) claim of eligibility as a "[c]ommon carrier[] engaged directly or indirectly in the business of affording public landline message telephone service" in the St. James RSA was based on its affiliation with Reserve Telephone Company, a small, independent, rural telephone company operating a wireline [1] local telephone service in the St. James RSA. MobileTel's claim of eligibility was based on its affiliation with Lafourche, which operated wireline local telephone service *outside* of the St. James and Plaquemines RSAs, and which had recently instituted local service to one customer *inside* each of these RSAs using Basic Exchange Telecommunications Radio Service ("BETRS") in place of wireline technology. BETRS is an alternative to wireline technology that is used to connect individual customers' telephones to the service provider's central office; instead of wires, BETRS

[1] The term "wireline" describes a system in which the connections between individual customers and central offices are made by wires, as opposed to alternative technologies such as radio links.

connects customers to central offices by means of radio transmissions. Where the terrain between the central office and individual customers is rugged (in this case, swampy), and therefore difficult or impossible to span with wires, BETRS facilitates the provision of local service to those customers. The Commission authorized the use of BETRS by local telephone companies in 1988, seven years after the establishment of the landline set-aside, and did not modify the set-aside subsequent to this authorization. *See In the Matter of Basic Exch. Telecomm. Radio Serv.*, 3 FCC Rcd 214 (1988) ("BETRS Order").

MobileTel won the lottery for the Block B frequencies in the St. James and Plaquemines RSAs, and was named the tentative selectee for both. After BellSouth and Columbia formed a limited partnership, BellSouth petitioned the Commission's Mobile Services Division ("MSD") to deny MobileTel's applications on the ground that MobileTel was ineligible because neither it nor its affiliate Lafourche provided *wireline* telephone service in these RSAs. BellSouth argued that the requirement, under § 22.902(b), that an applicant be providing "landline" service in the area for which it is applying to provide cellular service required the exclusion of applicants serving these areas only by means of non-wireline technologies such as BETRS. The MSD granted MobileTel's applications in October of 1990. *See In re Applications of MobileTel, Inc.*, 5 FCC Rcd 5854 (MSD) 1990). Although it acknowledged that the Commission had commonly referred to the Block B frequencies as the "wireline set-aside," and that the provision of BETRS-based service "does not qualify an applicant as a wireline for purposes of Section 22.902(b)," *id.* at 5855, the MSD reasoned that allowing companies providing local telephone service in particular cellular markets only through BETRS to compete for these frequencies was consistent with the Commission's intent in creating the set-aside. *See id.* at 5855-56. BellSouth and Columbia each filed petitions for

reconsideration of the MSD order, arguing that to allow an applicant providing only non-wireline service to apply for frequencies set aside for providers of "landline" service would violate the plain meaning of the regulation.

On January 27, 1995, the Commission adopted (but did not release) an order reversing the MSD and dismissing MobileTel's applications as unacceptable for filing, on the ground that "BETRS is indisputably a radio, not a 'landline' (or 'wireline') service," and that therefore MobileTel did not provide "landline" service in the St. James or Plaquemines RSAs as required for eligibility under § 22.902(b). On February 6, 1995, the Commission announced this order in a press release. On March 23, 1995, the Commission released an order vacating its (still-unreleased) January 27 order, and remanding the matter to the Wireless Telecommunications Bureau ("WTB") with directions that the WTB consider the relevance to the January 27 order of BellSouth's request to withdraw its petition and Columbia's request for approval of its settlement with MobileTel—facts of which the Commission had been unaware when it issued the January 27 order. *See In re Applications of MobileTel, Inc.*, 10 FCC Rcd 10657 (1996). The WTB later recused itself from further participation in the licensing proceeding for reasons unrelated to the issues in this appeal, and the Commission's Office of General Counsel assumed responsibility for making recommendations to the Commission on the remanded matters.

On August 14, 1996, the Commission returned to the conclusion it had reached in the never-released January 27 order: MobileTel was ineligible for the Block B frequencies in the St. James and Plaquemines RSAs, because the set-aside for providers of local "landline" service required the exclusion of applicants providing service only by means of non-wireline technologies such as BETRS. *See In re Applications of MobileTel, Inc.*, 1996 WL 459977 (F.C.C.) at 9. The Commission rejected MobileTel's argument that the provision of BETRS service in an

RSA could create eligibility for the set-aside, finding this interpretation inconsistent with the plain meaning of the term "landline," the Commission's prior decisions, and the purposes for which the set-aside was implemented. *See id.* at 4-8. The Commission also observed that allowing BETRS links to create eligibility under § 22.902(b) could enable applicants to undermine the set-aside system. The set-aside was intended to give a leg up to local telephone companies with an established presence in particular geographical areas, on the rationale that these local companies would have a unique reserve of expertise and knowledge about these areas. Because BETRS "loops" linking individual customers in particular RSAs to pre-existing central offices could be thrown up relatively quickly and cheaply, a company operating only BETRS-based local service in an RSA might well have been operating in the area only a very short while, and thus have no such local expertise. *See id.* at 8.

MobileTel filed this appeal from the August 14 order, and Columbia and BellSouth intervened.

II. Discussion

A. *The Commission's Construction of the Term "Landline"*

When we review a challenge to an agency's interpretation of its own regulations, we will accept the agency's interpretation unless it is "plainly wrong." *General Carbon Co. v. Occupational Safety & Health Review Comm'n.*, 860 F.2d 479, 483 (D.C. Cir. 1988) (citing *United States v. Larionoff*, 431 U.S. 864, 872 (1977) and *Udall v. Tallman*, 380 U.S. 1, 16 (1965)).

MobileTel argues that the Commission's construction of the term "landline" in § 22.902(b) of its regulations was plainly wrong because, by construing the term to exclude BETRS-based service, the Commission ignored and undermined the policies underlying the set-aside which that regulation created. Conceding that the Commission com-

monly used the terms "landline" and "wireline" interchangeably when it instituted what was generally referred to as the "wireline set-aside," MobileTel argues that the Commission's use of these terms prior to the 1988 order authorizing the use of BETRS technology must in retrospect be construed as describing the provision of local telephone service by BETRS, as well as by wires. MobileTel asserts that this must be the case, because excluding BETRS-based service from the set-aside conflicts with the policies underlying both the "wireline set-aside" and the Commission's order authorizing the use of BETRS by local service providers.

The Commission's stated intent in creating the set-aside, and in preserving it despite the switch to a lottery system, was to protect telephone companies that were small, that had a presence in the particular area in which cellular service was to be licensed, that might be squeezed out of the market altogether if they failed to land a local cellular license, and the demise of which would leave some customers with no local telephone service at all. *See Cellular Lottery Rulemaking*, 98 FCC 2d at 192-98. MobileTel argues that all of these factors should apply to companies providing local service via BETRS, and claims that as a provider of local BETRS-based service to customers in the St. James and Plaquemines RSAs, it has the same expertise and knowledge of these markets as a company that had set up wireline links in these RSAs would have. MobileTel also accuses the Commission of unfair and contradictory behavior, arguing that the Commission first encouraged local telephone companies to use BETRS, and then "puni[shed]" companies who took the bait by denying them eligibility for the "wireline set-aside" frequencies. Amended Brief for Appellant at 33.

When MobileTel filed its application, the Commisison's rules included no definition of the term "landline" or of the phrase "public landline message telephone service." The Commission points out that a 1986 dictionary of industry terms defined "landline" in such a way as to

include only wire-based or cable-based service, *see* Brief for Appellee at 22, while MobileTel cites a 1993 industry dictionary including fiber optic and microwave links in the definition. *See* Reply Brief for Appellant at 8 n.20. Given the facts that no statutory definition accompanied the regulation, and that industry dictionaries offer conflicting definitions which arguably could reflect the very sort of technological "updating" on which MobileTel's argument is premised, we obviously cannot resolve this dispute solely on the basis of the "plain meaning" of the word "landline" or of the phrase "public landline message telephone service" divorced from the policies underlying the set-aside. *Cf. In the Matter of Xerox Corp. and MCI Communications Corp.*, 90 FCC 2d 547, 550-54 (1982) (finding that the lack of a statutory definition of the term "public landline message telephone service" precluded a "plain meaning" answer to the question of whether a service not in existence at the time the regulation was drafted should fall within the scope of the phrase, and turning to other Commission policies and decisions to answer the question). The Commission's interpretation of "landline," and of the phrase in which it appeared in § 22.902(b), certainly was not clearly *wrong* under any "plain meaning" analysis, and thus we turn to the other grounds on which MobileTel challenges the Commission's interpretation.

The "wireline set-aside" was intended to benefit small telephone companies with a presence on a local market—companies with local expertise and experience, that could be squeezed out of business if they failed to land a local cellular license. MobileTel's argument that it was unreasonable for the Commission to exclude from this category companies that serve a market only via BETRS "loops" is disproved by the record in this case, which indicates that the sum and substance of MobileTel's "presence" and "experience" in the St. James and Plaquemines RSAs was the extension of radio service to *one* customer in each RSA—and even these minimal excursions were set up

just in time to support MobileTel's applications for the Block B cellular frequencies in these areas. The Commission's additional rationale based on its desire to minimize the number of competing applicants for each RSA also was served by the Commisison's interpretation barring providers of only BETRS-based service. Thus we must reject MobileTel's argument regarding the policies underlying the "wireline set-aside" because the Commission's construction of the term "landline" is consistent with several of these policies, and because only the Commission may decide how much precedence particular policies will be granted when several are implicated in a single decision.

Nor is the Commission's authorization of the use of BETRS to provide local telephone service fundamentally incompatible with its refusal to permit BETRS links alone to create eligibility for the "wireline set-aside." Had the Commission, in authorizing the provision of local service via BETRS, intended for BETRS service to be treated identically with wireline service in *all* respects, we doubt that the Commission would have enumerated certain contexts in which it intended for BETRS service and wireline service to be treated similarly. *See* BETRS Order, 3 FCC Rcd at 223 n.10 ("It is our intention that wire and radio basic exchange service be treated similarly with regard to eligibility for high cost assistance."). Merely declining to extend them eligibiliy for a special set-aside cannot fairly be described as "punishing" companies that set up BETRS links. Nor can we accept MobileTel's argument that the introduction of BETRS technology implied a radical alteration in the definitions of the terms "landline" and "wireline"; we note that BETRS is not the first technology to substitute for wires in the provision of local telephone service—the replacement of wireline links with cellular, fiber optic, or "point-to-point microwave" service predated the authorization of BETRS service, and none of these technologies was thought to have

implied any redefinition of the terms "landline" or "wireline." [2]

MobileTel also argues that even if the Commission's interpretation of the term "landline" was not plainly wrong, the Commission was obliged to waive the eligibility requirement for MobileTel in light of the policies underlying the set-aside and the authorization of BETRS service. *See* Amended Brief for Appellant at 36-39. In its order, the Commission expressly declined to waive the eligibility rules for MobileTel because it was "unpersuaded that the purposes underlying [the] eligibility rule would be frustrated absent a waiver," *In re Applications of MobileTel, Inc.*, 1996 WL 459977 (F.C.C.) at 7, and cited the same policy justifications that it applied in support of its construction of the term "landline." These justifications adequately support the Commission's refusal to grant MobileTel a waiver, particularly in light of the fact that MobileTel's extension of local service in the St. James and Plaquemines RSAs was extremely limited in tenure and scope, and thus MobileTel was distinctly not in the genre of companies that the Commission intended for the set-aside to benefit.

Because the Commission's interpretation of the term "landline" as used in § 22.902(b) of its regulations was reasonable and consistent with several of the Commission's relevant policies, we easily conclude that this interpretation was not "plainly wrong."

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[2] A portion of the Commission's 1988 regulations not directly involved in this case demonstrates that all of the technologies encompassed by the Rural Radio Service were, at the time of MobileTel's application, explicitly treated by the Commission as *alternatives* to "wireline" service, rather than as types of service subsumed within the definition of "wireline." *See* 47 C.F.R. § 22.609(a) (1988) ("Each application in [the Rural Radio Service] shall be accompanied by a showing why it is impracticable to provide the required communication service by means of wireline facilities.").

B. *The Commission's Notice to Applicants*

MobileTel next argues that even if the Commission's construction of its rule was not plainly wrong and the Commission was justified in refusing to waive the rule, we should overturn the August 14 order because the regulation "as written," and the Commission's interpretation of it in prior orders, had given MobileTel the reasonable impression that the set-aside "covered all parties who provide local telephone service in an area," whether by wires or by an alternative technology. Amended Brief for Appellant at 40-41 (citing *McElroy Elec. Corp. v. FCC*, 990 F.2d 1351, 1358-63 (D.C. Cir. 1993)). MobileTel bases this argument on the same theories it offered in support of its assertion that the Commission's interpretation of the regulation was unreasonable.

In *McElroy*, we reversed a Commission order dismissing several applications for cellular licenses as untimely filed because we found that under a "fair reading," the Commission's order establishing the timeline for applications failed to give prospective applicants for the licenses notice of the proper time window for filing. *Id.* at 1358. Because we doubted that the Commission's interpretation of its order was "*reasonably comprehensible to* [*people acting in*] *good faith*" at the time the order was issued, *id.* (quoting *Maxcell Telecom Plus, Inc.*, 815 F.2d at 1558 (quoting *Bamford v. FCC*, 535 F.2d 78, 82 (D.C. Cir. 1976) (quoting *Radio Athens, Inc. (WATH) v. FCC*, 401 F.2d 398, 404 (D.C. Cir. 1968))) (emphasis added by the *Maxcell court*)), we ordered the reinstatement of several applications.

In this case, MobileTel itself describes the Commission's construction of the term "landline" as "literalistic," Amended Brief for Appellant at 19, suggesting that MobileTel's notice argument is premised on the extraordinary assertion that a "good faith" applicant trying to give the regulation a "fair reading" would not have understood that the term "landline" was to be read "literally."

What makes it even more implausible that MobileTel could have misunderstood the term "landline" is the fact that only two months before Lafourche set up BETRS links in St. James and Plaquemines, the Commission had annouced in *In re Application of the Offshore Telephone Co.*, 3 FCC Rcd 4601 (1988), that the provision of exclusively *radio*-based service in an RSA does not render a company eligible for the "wireline set-aside" frequencies in that RSA. (MobileTel was even better situated to mark the significance of the *Offshore* decision than were other "good faith" readers of the Commision's regulation, because MobileTel's parent SJI, Inc. was a party to the *Offshore* case.)

Because we believe a good faith prospective applicant for the Block B frequencies in the St. James and Plaquemines RSAs would, upon giving § 22.902(b) of the Commission's regulations a fair reading, have understood that the provision of only BETRS-based service in these RSAs would not create eligibility for these frequencies, we reject MobileTel's notice argument.

C. *The Commission's Refusal to Consider MobileTel's Settlement Agreement With Columbia*

Finally, MobileTel argues that the Commission acted arbitrarily and capriciously in dismissing its applications because MobileTel and Columbia had arrived at a settlement agreement, and the Commission failed to consider the possibility that dismissing MobileTel's application would contravene the purpose of the Commission's directives encouraging mutually-exclusive applicants to create such agreements. The Commission clearly does have a policy of encouraging settlements, *see Cellular Communications Systems*, 86 FCC 2d at 490-91, but MobileTel itself acknowledges that this policy does not extend so far as to justify the approval of a settlement agreement if that would result in the grant of a license to an unqualified applicant. *See* Amended Brief for Appellant at 14 n.40

(citing *In re Applications of Kannapolis Television Co.*, 1 FCC Rcd 1037, 1039 (1986)). Because MobileTel was ineligible for the Block B frequencies, the Commission did not act arbitrarily or capriciously in dismissing MobileTel's application despite the fact that MobileTel had entered into a settlement agreement with an eligible entity.

MobileTel also claims that in remanding the matter to the WTB for its consideration of the settlement agreement's relevance, the Commission *must* have relied on the assumption that MobileTel was eligible for the set-aside frequencies, because otherwise it would by its remand have been directing the WTB to engage in "the vain act of promoting a settlement with an unqualified party." Amended Brief for Appellant at 47. But at that point the Commission might have lacked the full panoply of information needed to determine whether its policy barring the acceptance of settlements involving unqualified entities would apply. For example, a settlement involving an ineligible entity may be acceptable if, under the agreement, the ineligible entity is to hold only a noncontroling interest in the entity to be granted the license. *See In re Applications of Advanced Mobile Phone Serv., Inc.*, 93 FCC 2d 683, 691-93 (1983). Thus, because the Commission might reasonably have thought that the *possible* relevance of the settlement agreement to the January 27 order was a matter for the WTB to address in the first instance, the March 23 order cannot be viewed as a final determination-by-implication that MobileTel was eligible for the set-aside frequencies.

For the foregoing reasons, the Commission's August 14 order dismissing MobileTel's applications for "wireline set-aside" frequencies in the St. James and Plaquemines RSAs as ineligible under 47 C.F.R. § 22.902(b) is hereby

Affirmed.

APPENDIX B

FCC 96-345

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of:

MOBILETEL, INC.
For Facilities in the Domestic Public
Cellular Radio Telecommunications Service
on Frequency Block B,
in Market 461, Louisiana 8—St. James

File No. 10538-CL-461-B-89

For Facilities in the Domestic Public
Cellular Radio Telecommunications Service
on Frequency Block B,
in Market 462, Louisiana 9—Plaquemines

File No. 10539-CL-P-462-B-89

MEMORANDUM OPINION & ORDER

Adopted: August 12, 1996; Released: August 14, 1996

By the Commission: Chairman Hundt not participating.

INTRODUCTION

1. The Commission has before it petitions filed by BellSouth Mobility, Inc. ("BellSouth") and Columbia Cellular, Inc. ("Columbia") seeking reconsideration of a decision issued by the Common Carrier Bureau's Mobile Services Division ("MSD") granting the above-captioned authorizations to MobileTel, Inc. ("MobileTel") to provide

cellular service in frequency Block B.[1] The Commission also has before it: (1) a motion filed by BellSouth seeking dismissal with prejudice of its petition for reconsideration; (2) a request for approval of a settlement agreement filed by Columbia; (3) a motion filed by Columbia seeking suspension of consideration of both its request for approval of the settlement agreement and the motion to dismiss filed by BellSouth; and (4) a motion filed by Columbia seeking an evidentiary hearing.

2. For the reasons discussed below, we dismiss MobileTel's applications as unacceptable for filing and rescind its licenses because MobileTel, at the time it filed these applications, was not a wireline common carrier eligible for these particular Block B cellular authorizations. As a consequence, we dismiss as moot Columbia's motion to suspend and its motion for evidentiary investigation, and we deny its request for approval of the settlement agreement. We grant BellSouth's motion to dismiss its petition for reconsideration, and we dismiss Columbia's petition for reconsideration.

BACKGROUND

3. Between October 19, and 21, 1988, MobileTel submitted timely applications for the wireline Block B licenses in the Louisiana 8—St. James and Louisiana 9—Plaquemines, Rural Services Areas (RSAs). BellSouth and Columbia filed individual applications for the wireline Block B Louisiana 8 RSA. Subsequently, BellSouth and Columbia entered into a partial settlement agreement forming the Louisiana RSA No. 8 Limited Partnership ("Partnership").[2] BellSouth also filed a competing application in

[1] Although petitions for reconsideration of actions taken on delegated authority are generally reviewed by that delegated authority, pursuant to 47 C.F.R. § 1.106, this matter has been referred to the Commission.

[2] *See* BellSouth's Petition to Dismiss or Deny filed December 13, 1989, n.1. BellSouth stated that it and Columbia, through the joint

the Louisiana 9—Plaquemines RSA. In 1989, after a lottery, MobileTel was named the tentative selectee for the wireline cellular construction authorizations for both RSAs.[3] BellSouth filed a petition to dismiss or deny MobileTel's applications on behalf of itself and the Partnership for the Louisiana 8 RSA. In addition, it filed a petition to dismiss or deny MobileTel's application in the Louisiana 9 RSA.[4]

4. In its petitions, BellSouth argued that MobileTel was ineligible to apply because its wireline affiliate, Lafourche Telephone Company, Inc. ("Lafourche"),[5] did not provide wireline service in RSAs 8 and 9 as required by then-existing Section 22.902(b) of the Commission's Rules.[6] Lafourche does provide wireline basic switched telephone service in Lafourche Parish, and Jefferson Parish, Louisiana. However, neither Lafourche Parish or Jefferson Parish is located in the Louisiana 8 nor Louisiana 9 RSA. Lafourche is also certified by the Louisiana Public Service Commission to provide basic switched telephone service in the Louisiana 8 and 9 RSAs, but it does so only through the provision of Basic Exchange Telecommunications Radio Service (BETRS).[7] In particular,

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partnership, would amend BellSouth's application to reflect the new ownership structure upon dismissal of MobileTel's application. In addition, Columbia would seek dismissal of its application.

[3] *See MobileTel, Inc.*, 5 FCC Rcd 5854, 5856 n.1 (Mobile Serv. Div. 1990).

[4] *See MobileTel, Inc.*, 5 FCC Rcd at 5854. *See also* BellSouth's Petition to Dismiss or Deny filed on December 13, 1989.

[5] MobileTel and Lafourche are both wholly-owned subsidiaries of SJI, Inc. ("SJI").

[6] The Commission subsequently eliminated the wireline carrier set aside provision contained in Section 22.902(b). *See Report and Order*, CC Docket Nos. 92-115, 94-46, 93-116, 9 FCC Rcd 6513 (1994). *See also Notice of Proposed Rulemaking*, CC Docket No. 92-115, 7 FCC Rcd 3658, 3672-3673 (1992).

[7] Then-existing Section 22.2 of the Commission's rules defined BETRS as follows:

Lafourche began providing BETRS service to one residential customer in the St. Charles Parish (which is part of the St. James RSA) beginning on September 16, 1988 and to another customer (an exploration company) in Plaquemines Parish on October 14, 1988.[8] BellSouth argued in its petitions to dismiss or deny that the provision of service only through BETRS, a radio service, was insufficient to qualify MobileTel for the wireline authorizations.

5. The MSD concluded that MobileTel was eligible to apply for licenses in both RSAs. The MSD recognized that MobileTel's affiliate provided service to subscribers in the relevant markets only through BETRS.[9] The MSD concluded, however, that allowing a wireline carrier that provides in the relevant market only BETRS service, a radio service that was not in existence at the time the Commission promulgated its eligibility rule for Block B cellular authorizations, to qualify for a wireline authorization was consistent with the underlying purpose of the

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> In the Rural Radio Service this service provides public message communication service between a central office and fixed subscribers located in rural areas. In the Domestic Public Cellular Radio Telecommunications Service, this service provides public message communication service to fixed subscribers in Rural Service areas and in rural parts of Metropolitan Statistical Areas.

47 C.F.R. § 22.2 (1994). This definition has since been eliminated from our rules. *See Report and Order*, CC Docket Nos. 92-115, 94-46, and 93-116, 9 FCC Rcd 6513 (1994). In establishing BETRS, the Commission also stated that "BETRS is provided so that radio loops can take the place of (expensive) wire or cable to remote areas. It is intended to be an extension of intrastate basic exchange service." *Report and Order*, CC Docket No. 86-495, 3 FCC Rcd 214, 217 (1988).

[8] *See* MobileTel's Letter to Greg J. Vogt, Chief, Mobile Services Division dated July 18, 1990.

[9] *See MobileTel, Inc.*, 5 FCC Rcd at 5854.

wireline eligibility rule.[10] The MSD thus concluded that MobileTel was not precluded from filing Block B cellular applications in the relevant markets.[11]

6. BellSouth and Columbia each filed petitions for reconsideration of the MSD's decision, both arguing that the provision of service in the relevant RSAs through BETRS was insufficient to qualify MobileTel for the wireline authorizations in these markets.[12] Alternatively, the parties argued that even if BETRS in and of itself was sufficient to bestow eligibility, such action would be unwarranted since MobileTel's wireline eligibility would be based on the initiation of BETRS service to only one customer in each of the RSAs within a few days prior to the date cellular applications were to be filled (*see* ¶ 4, *supra*).[13] MobileTel opposed both petitons.[14] Subse-

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[10] *See MobileTel, Inc.*, 5 FCC Rcd at 5854.

[11] *See MobileTel, Inc.*, 5 FCC Rcd at 5855.

[12] *See* BellSouth's Petition for Reconsideration filed November 13, 1990; Columbia's Petition for Reconsideration filed November 13, 1990.

[13] *See* BellSouth's Petition for Reconsideration at 10; Columbia's Petition for Reconsideration at 3.

[14] *See* MobileTel's Consolidated Opposition to Petition for Reconsideration at i-ii, filed on December 12, 1990. Subsequently, BellSouth and Columbia each filed supplements to their petitions advancing the unresolved character issues regarding SJI Cellular, Inc. in the *La Star Cellular Telephone Company* proceeding. *See La Star Cellular Telephone Company*, 7 FCC Rcd 3762 (1992), *remanded on other grounds sub nom. Telephone and Data Systems, Inc. v. FCC*, 19 F.3d 655 (D.C. Cir. 1994). SJI Cellular, Inc., like MobileTel, is a wholly-owned subsidiary of SJI, Inc. (*see* n.5, *infra*). In *La Star*, the Commission affirmed an Initial Decision finding that SJI (a wireline carrier in the New Orleans, LA MSA) did not control La Star and, therefore, La Star was not eligible for a Block B authorization in the New Orleans, LA MSA. *See La Star*, 7 FCC Rcd at 3764. Because the Commission's decision resulted in dismissal of La Star's application, the Commission did not address lack of candor issues raised against SJI. *See La Star*, 7 FCC Rcd at 3767, n.3. The Commission stated, however, that the

quently, however, BellSouth filed a motion to dismiss with prejudice its petition for reconsideration and supplement.[15] Columbia, in turn, filed a request for approval of a settlement agreement between it and MobiileTel requesting, among other things, that the Commission dismiss Columbia's petition for reconsideration.

7. On January 27, 1995, the Commision adopted an order granting the petition for reconsideration filed by BellSouth and dismissing MobileTel's applications on the grounds that MobileTel was ineligible to hold wireline licenses for these RSAs. In addition, the Commission ruled that Columbia lacked standing to file a petition for reconsideration because it did not participate in the initial stages of the proceeding. Accordingly, the Commission dismissed Columbia's petition. The order did not mention BellSouth's motion to dismiss or Columbia's request for approval of settlement. On February 6, 1995, the Commission issued a press release announcing the adoption of the January 27, 1995 order, but the order itself was not released. By order released on March 23, 1995,[16] the Commission then vacated its unreleased January 27, 1995 order and instructed the Wireless Telecommunications Bureau to consider promptly the pending motion to dismiss and request for approval of the settlement agreement.[17]

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issues regarding SJI's conduct may be revisited in future proceedings. MobileTel opposed the filing of these supplements on the grounds that the supplements were procedurally defective and, in any event, lacked merit. These issues have now been resolved in SJI's favor. *See La Star Cellular Telephone Company*, 11 FCC Rcd 1059 (1996).

[15] *See* BellSouth's Motion to Dismiss With Prejudice filed March 18, 1994.

[16] *See MobileTel, Inc.*, FCC 94-124, released March 23, 1995.

[17] The Wireless Telecommunications Bureau had, by this time, assumed responsibility over this proceeding from the Common Carrier Bureau.

8. In addition, the Secretary of the Commission, by letter dated March 10, 1995, informed the parties of certain ex parte presentations that had been received by the Commision regarding these proceedings. In response to the Commission's orders of January 27, and March 23, 1995 and the notification of the ex parte presentations, Columbia on March 27, 1995 filed a motion to suspend consideration of BellSouth's withdrawal request and Columbia's proposed settlement agreement.[18] MobileTel opposed Columbia's motion.[19] Subsequently, Columbia filed a motion for evidentiary investigation requesting a hearing concerning the facts surrounding the Commission's January 27, 1995 and March 23, 1995 orders and the ex parte presentations, which MobileTel also opposed.[20]

DISCUSSION

Procedural Issues and Pending Motions

9. At the outset, we address BellSouth's pending motion to dismiss and Columbia's request for approval of the settlement agreement. We shall grant BellSouth's motion to dismiss its petition for reconsideration and related pleadings. Section 22.129 of the Commission's rules[21] re-

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[18] Columbia also filed a request pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, requesting a copy of the text of the Commission's January 27, 1995 decision and additional information regarding the ex parte presentations. By letter dated April 25, 1995, the Commission responded to Columbia's FOIA request, providing a copy of the unreleased January 27, 1995 order.

[19] *See* MobileTel's Opposition to Motion to Suspend Consideration of Withdrawal Request and Proposed Agreement filed April 11, 1995.

[20] *See* Columbia's Motion for Full Evidentiary Investigation filed May 30, 1995. *See also*, MobileTel's Opposition to Motion for Full Evidentiary Investigation filed June 21, 1995.

[21] 47 C.F.R. §§ 22.927 and 22.928 have now been codified at 47 C.F.R. § 22.129. *See Report and Order*, CC Docket Nos. 92-115, 94-46, and 93-116, 9 FCC Rcd 6513 (1994).

quires that a party seeking to dismiss or withdraw a petition file a request for approval of the withdrawal, copies of any related written agreements, and an affidavit personally signed by the filing party certifying, among other things, that it has not received any money or consideration in excess of its legitimate and prudent expenses.[22] Bell South has complied with these requirements and we therefore grant its motion.[23]

10. However, we deny Columbia's request for approval of the settlement agreement between it and MobileTel. As explained below, MobileTel is not eligible to hold Block B authorizations in the Louisiana 8 or 9 RSAs. As the proposed settlement agreement would leave MobileTel as the Block B licensee of the Louisiana 8 RSA and, at least temporarily, for the Louisiana 9 RSA, we find that the settlement agreement is inconsistent with our eligibility rules. In this regard, we note that in the past the Commission has declined to approve settlement agreements where the applicant who would receive the licenses is not eligible or qualified.[24] Accordingly, we deny Columbia's request.

11. We will also dismiss Columbia's petition for reconsideration. MobileTel argues that Columbia has waived its right to file a petition for reconsideration because it failed to participate during earlier stages of the proceeding. We agree that Columbia's petition should be dis-

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[22] 47 C.F.R. § 22.129.

[23] BellSouth's corporate official submitted a declaration under penalty of perjury in lieu of an affidavit. We note that such a submission is permitted under 47 C.F.R. § 1.16.

[24] *See, e.g., Kannapolis Television Co.*, 1 FCC Rcd 1037, 1039 (1986) (rejecting proposed settlement agreement that contemplated grant of broadcast construction permit to applicant Commission found unqualified), *reconsideration granted on other grounds*, 3 FCC Rcd 2676 (1988). In this case, the Commission stated that, "[i]t is well-established that construction permits may be awarded only to fully qualified applicants." *Kannapolis* 1 FCC Rcd at 1039.

missed pursuant to Section 1.106 of the Rules. Columbia chose not to file its own petition to deny against MobileTel's application for the Louisiana 8 RSA. Rather, it relied on BellSouth to represent its interests through the BellSouth petition to deny that was filed "on behalf of" itself and the Louisiana 8 Limited Partnership, in which Columbia is a limited partner. As such, Columbia did not participate as an independent party in the proceeding leading to the Bureau's decision to grant MobileTel's application. Columbia claims that it nevertheless should be allowed to file its separate reconsideration petition because it is a "party" by virtue of its application that was dismissed in the Bureau's decision to make the MobileTel grants. However, merely because the Bureau's decision to grant MobileTel's application affected Columbia's pending application does not render Columbia a participating party with respect to the Bureau's action. Nor does Columbia show good cause why it was not possible for it to participate in the earlier stages of the proceedings.[25] Accordingly, pursuant to 47 C.F.R. § 1.106(b) of the rules, its petition for reconsideration is dismissed. In resolving the eligibility issue, we have, however, considered the arguments made in Columbia's petition.

12. Finally, in light of our decision below to dismiss MobileTel's applications as unacceptable for filing, Columbia's Motion for Full Evidentiary Investigation and its Motion to Suspend Consideration of the Motion to Dismiss and Settlement Agreement are moot. Accordingly, these motions are also dismissed.

Wireline Set-aside Eligibility Issue

13. Notwithstanding our dismissal of the petitions for reconsideration, we address, on our own motion and consistent with Commission precedent providing that the Commission will examine qualifications issues even where

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[25] *See* 47 C.F.R. § 1.106(b)(2).

petitions are dismissed, the issue of MobileTel's eligibility to hold Block B authorizations in these RSAs as part of our independent public interest analysis.[26] We find that MobileTel was not eligible to hold the authorizations in question and, therefore, we set aside the MSD's grant of these licenses to MobileTel.

14. At the time MobileTel filed its applications, Section 22.902(b) of our rules provided that:

> Common carriers not also engaged in the business of affording public landline message telephone service will be assigned frequencies from Cellular System A. Common carriers engaged directly or indirectly in the business of affording public landline message telephone service will be assigned frequencies from Cellular System B in those areas in which they provide such landline service in some portion of the cellular market.[27]

15. MobileTel does not dispute that, at the time it filed its applications, it did not provide basic exchange telephone service to these RSAs through the use of wires, but only through the use of BETRS. Thus, the issue before us is whether MobileTel's provision only of BETRS within the relevant RSAs may be deemed the provision of "public landline message service" within the meaning of the eligibility rule and thus whether MobileTel provides "such landline service in some portion of the cellular market[s]." As indicated above, the MSD concluded that allowing MobileTel to establish its eligibility through the provision of BETRS would be consistent with the policy rationales

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[26] *See, e.g., Edens Broadcasting, Inc. For Renewal of Licenses for Stations KKLQ/KKLQ-FM San Diego, California*, 8 FCC Rcd 8405 (1993); *Pinelands, Inc.*, 7 FCC Rcd 6058 (1992), *appeal dismissed sub nom., Garden State Broadcasting Limited Partnership v. Federal Communications Commission*, 996 F.2d 386 (D.C. Cir. 1993).

[27] 47 C.F.R. § 22.902(b) (1988), (1989) and (1994).

underlying both the wireline eligibility rule and our rules establishing BETRS. Specifically, the MSD concluded that "[g]iven the reason for adopting the wireline set aside and the reasons for establishing the BETRS service as an extension of basic exchange telephone service," [28] a carrier that provides BETRS should qualify for a Block B license. The MSD's decision does not expressly articulate the manner in which the rules' underlying policy objectives would be furthered. The MSD stated, however, that although a company providing BETRS service only would not qualify as an applicant,

> where a company with permission from the state to provide basic exchange radio service or certificated as a local exchange carrier, chooses to use BETRS as an extension of its wireline basic exchange service, this election does not disqualify the local telephone company from filing for the Block B wireline frequencies for RSAs in which it provides BETRS service.[29]

16. Presumably, therefore, the MSD contemplated that because the Commission has viewed BETRS as an extension of wireline basic exchange telephone service, the provision of BETRS in circumstances where the applicant provides wireline service in an adjacent market should be treated as the equivalent of offering wireline service in the market for which it applied. The MSD apparently also believed that its approach would facilitate the provision of cellular service by small rural telephone companies, consistent with the purpose of the wireline eligibility rule, and would encourage service to remote rural areas, consistent with our objectives in establishing BETRS.[30]

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[28] *MobileTel, Inc.*, 5 FCC Rcd at 5855.

[29] *MobileTel, Inc.*, 5 FCC Rcd at 5854-5855.

[30] *See MobileTel, Inc.*, 5 FCC Rcd at 5855, ¶¶ 7, 11.

17. In support of the MSD's decision, MobileTel also asserts that the Commission has never expressly defined the term "landline" used in the eligibility rule and argues that the MSD's interpretation of the rule is reasonable. Specifically, it believes that the term should not be construed to encompass only the provision of service using "hard wires" because the term was not intended to be "technology specific." MobileTel believes that, viewed in context, the rule was intended to refer to any local telephone company providing basic exchange service. In this regard, MobileTel also notes that local exchange carriers routinely use a mix of wire and radio services. It further believes that there is no reason to distinguish between a certificated carrier that supplies local exchange telephone service by radio, as opposed to wire. In addition, MobileTel argues that "it would defy all logic and common sense for the Commission to authorize BETRS as a substitute for wire and cable local exchange service and then penalize carriers that obtain BETRS authorization in order to provide basic exchange service to remote areas."

18. We find the arguments set forth in the MSD's order and those presented by MobileTel unpersuasive. First, we cannot agree with MobileTel that the term "landline" used in Section 22.902(b) in describing the requirement that "landline" service be offered in the relevant market can be construed "in context" to encompass services that exclusively use radio technology in the relevant market. To the contrary, based on the contexts in which the word landline has been used, it is evident that the Commission consistently uses the term to describe the provision of wireline service. Thus, although "landline" is not defined in our rules, its meaning can be readily discerned from the Commission's decisions and orders, adopted prior to the filing of MobileTel's applications, which uniformly equate the term "landline" with the provision of telephone service by wire or "wireline" serv-

ice. The Commission's 1981 *Report and Order* adopting the eligibility rule for Block B cellular frequencies noted that since 1949 "nearly all common carrier mobile allocations have been separated into discrete bands for wireline common carriers (WCCs) and non-wireline common carriers (commonly known as radio common carriers) . . . ." [31] The Commission's rulemaking order thus repeatedly refers to the Block B frequencies for which MobileTel seeks eligibility as those set aside for "wireline" carriers.[32] Accordingly, we think there is no doubt that the Commission used the term "landline" in Section 22.902(b) to mean wireline services and that it did so in order to distinguish them from radio common carrier services.

19. Furthermore, our decisions and interpretations subsequent to the rule's adoption also have consistently held that the term "landline" does not encompass radio services. For example, in *Xerox Corp.*,[33] a decision issued one year after the rule's adoption, the Commission explained that it historically has allocated separate frequencies for wireline and nonwireline applicants in a variety of radio services and, in those contexts, "[a] carrier engaged in the business of affording public landline telephone service refers to a wireline carrier while a carrier which does not provide this service is a nonwireline carrier." [34] Similarly, in 1982, and prior to the Bureau's decision in the instant proceeding, we generally revised our Part 22 rules, and in so doing added a definition of "wireline carrier." That definition, which is currently incorporated in Section 22.99 of the rules, defines such carriers as providing "landline" local exchange telephone

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[31] *Report and Order*, CC Docket No. 79-318, 86 F.C.C. 2d 469, 471 (1981).

[32] *See, e.g., id.* at 482-498.

[33] *Xerox Corp.*, 90 F.C.C. 2d 547, 552-54 (1982).

[34] *Xerox Corp.*, 90 FCC 2d at 552 n. 7.

service.[35] We used the term "landline" in the definition for the express purpose of "eliminating ambiguity" in response to commenters' concerns that providers of radio local exchange services, such as cellular service, might otherwise be encompassed within the definition.[36] In our rule's definition, we thus use the word "landline" to clarify that wireline services use hard wire and not radio.

20. Finally, in *Offshore Telephone Company*,[37] which was also issued prior to the filing of MobileTel's applications, we interpreted Section 22.902(b) itself and concluded that Offshore, a provider of point-to-point microwave service was not eligible for Block B frequencies because "[a]s a provider of radio service, Offshore does not comply with the plain meaning of the 'public *landline* service' requirement of Section 22.902(b) of the Rules." [38] The MSD believed that our decision in *Offshore* did not preclude a grant to MobileTel because *Offshore* involved a point-to-point microwave service, whereas the instant case involved an applicant with permission from the state to provide basic exchange telephone service in the relevant market. As Columbia points out, however, the core holding of *Offshore* rests on our determination that a provider of "radio" service does not provide "landline" service. No doubt exists, therefore, that, under our precedents, the word landline as used in Section 22.902(b) does not encompass a radio service.

21. Moreover, we emphasize that Section 22.902(b) not only required that an applicant provide landline serv-

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[35] Previously, the definition was codified at 47 C.F.R. § 22.2 (1994).

[36] *See Report and Order*, CC Docket No. 80-57, 95 FCC 2d 769, 772 (1983).

[37] *Offshore Telephone Company*, 3 FCC Rcd 4601 (1988).

[38] *Offshore Telephone Company*, 3 FCC Rcd at 4601 (emphasis in original).

ice, but also expressly required the provision of such landline service in the market in which the applicant seeks to provide cellular service. Section 22.902(b) stated in pertinent part that,

> [c]ommon carriers engaged directly or indirectly in the business of affording public landline message service will be assigned frequencies from Cellular System B *in those areas in which they provide such landline service in some portion of the relevant market.*[39]

We have strictly enforced this requirement, as our case precedent demonstrates. For example, in *Fort Mojave Indian Tribe,*[40] the Commission dismissed the applications for Block B frequencies filed by the Mojave Tribe because the tribe was not providing landline local exchange telephone service at the time it filed its application for the Arizona I RSA.[41] As the Commission explained,

> [w]e conclude that applicants for wireline cellular frequencies must be providing landline local exchange telephone service at the time of filing an application in order to be eligible for those frequencies. *We cannot determine whether an applicant has a presence in a market if it is not providing landline local exchange telephone service in that market.*[42]

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[39] 47 C.F.R. § 22.902(b) (1988) (emphasis added).

[40] *Fort Mojave Indian Tribe*, 6 FCC Rcd 6852 (1991), *aff'd*, 983 F.2d 298 (D.C. Cir. 1992) (table). *See also Indian Cellular Telephone Company/NY #4*, 6 FCC Rcd 6856 (1991), *aff'd sub nom. Fort Mojave Indian Tribe v. FCC*, 983 F.2d 298 (D.C. Cir. 1992) (table); *Montgomery Independent Cellular Telephone Company, Inc.*, 4 FCC Rcd 2323 (1989) (the Commission affirmed the dismissal of a wireline cellular application because the applicant was not a provider of a landline service in the market).

[41] *Fort Mojave Indian Tribe*, 6 FCC Rcd at 6855.

[42] *Fort Mojave Indian Tribe*, 6 FCC Rcd at 6854 (emphasis added).

Thus, merely because the applicant in *Fort Mojave* was certificated to provide landline service in the relevant area was not sufficient to render the applicant eligible for the Block B frequencies.[43] We therefore have made plain that, to satisfy the rule, an applicant must be an actual provider of wireline service in the market.

22. Although MobileTel's affiliate, Lafourche, does provide landline service, such service is provided in adjacent markets and not in the Louisiana 8 and 9 RSAs, the markets for which MobileTel seeks authorization to provide cellular service using Block B frequencies. As explained above, the provision of landline service outside the relevant market does not meet the requirements of the rule. Lafourche provides BETRS service in the relevant markets, but it is undisputed that BETRS service is a radio not a wireline service. The BETRS service was established in 1988 as part of the Rural Radio Service, a "radio service in which common carriers are authorized to offer and provide radio telecommunications services . . . in areas where it is not feasible to provide communications services by wire . . . ."[44] As a radio service, BETRS service thus is not a wire or "landline" service that satisfies the eligibility requirements of Section 22.902(b).

23. Moreover, merely because BETRS may be provided only by authorized basic exchange carriers, 47 C.F.R. § 22.702 (1995), does not affect the service's

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[43] *Fort Mojave Indian Tribe*, 6 FCC Rcd at 6853. *See also Indian Cellular Telephone Company/NY #4*, 6 FCC Rcd at 6857.

[44] *See* 47 C.F.R. § 22.99 (1995). Previously, the term "rural radio service" was defined in relevant part as, "[a] public radio service rendered by fixed station on frequencies below 1000 MHz used to provide (1) Basic Exchange Telecommunications Radio Service, which is public message communications service between a central office and subscribers located in rural areas." 47 C.F.R. § 22.2 (1988). *See also Report and Order*, CC Docket No. 86-495, 3 FCC Rcd 214 (1988).

status as a radio service. We also recognize that, notwithstanding the differences in technology used, BETRS service is similar in functional respects to the local exchange wireline services provided by carriers eligible to apply for Block B frequencies and that BETRS is intended to be used in conjunction with such wireline services. Nevertheless, none of these factors satisfies the criterion in our eligibility rule that wireline service be provided in the market for which an authorization is being sought.

24. The requirement for wireline service in the relevant market reflects sound public policy which leads us to decline to make an exception to our rules in these circumstances. We note in this regard that MobileTel did not seek a waiver of our rules to establish its eligibility and the MSD did not purport to grant one. In the absence of a waiver request, the Commission is not required to waive its rules.[45] In any event, and to the extent the MSD's decision appears to rest on policy considerations and implicitly constitutes a waiver, we are unpersuaded that the purposes underlying our eligibility rule would be frustrated absent a waiver. As the MSD noted, our eligibility rule is intended in part to foster the provision of cellular service by small telephone companies, and thereby to promote their "continued financial viability . . . to ensure our goal of universal service."[46] That goal, however, is not the only objective underlying our rule, nor was it intended to supersede all other objectives of the rule. A central purpose of our rule was to expedite the provision of cellular service to the public by reducing the number of applicants for one of the frequencies. Specifically, the Commission was concerned that the use of comparative hearings to issue

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[45] We note that, even when a waiver request is filed, the applicant faces "a high hurdle even at the starting gate." *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

[46] *Report and Order*, CC Docket No. 83-1096, 98 FCC 2d 175, 195 (1986).

licenses among mutually-exclusive applications would substantially delay the provision of cellular service to the public. The Commission believed that allowing only wireline carriers to apply for Block B authorizations would avoid comparative hearings since only a limited number of carriers per market would be eligible to apply. Further, limiting the number of applicants would serve as an incentive for applicants to settle.[47] In adopting the rule, the Commission thus deliberately intended to restrict the number of eligible applicants for Block B authorizations. Indeed, we expressly declined to adopt our prior policy, reflected in *Bonduel Telephone Company*,[48] which, in other radio services, had permitted wireline companies to apply for wireline frequencies in any market, without regard to whether they were doing business in the relevant market as a wireline.[49]

25. Moreover, when the Commission subsequently decided to use lotteries to select among competing applicants, it did not depart from its policy of restricting eligibility. In deciding to maintain the wireline set-aside in the face of lotteries, the Commission found that it should continue to limit the eligibility of Block B frequencies to wireline carriers with a wireline presence in the market. The Commission concluded that such a limitation encouraged major settlements, which, in turn, minimized the administrative burden, delay and expense of granting a cellular licenses [sic] and expedited service to the public.[50] In light of this fundamental objective of the rule, we, therefore, do not believe that a waiver is warranted to achieve the rule's underlying purposes. Instead, by strictly adhering to the requirements of our rule,

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[47] *Report and Order*, 86 FCC 2d at 490-491.

[48] *See Bonduel Telephone Company*, 68 FCC 2d 497 (1978).

[49] *See Report and Order*, 86 FCC 2d at 490, n.56.

[50] *See Report and Order*, 98 FCC 2d 196-197.

we strike the balance that is most consistent with the rule's multiple objectives.

26. We are also concerned that creating an exception for BETRS service could invite carriers in adjacent markets to circumvent the purpose of the wireline set-aside rule, such as by providing a very small amount of BETRS service in the relevant market in order to secure wireline eligibility. Although we express no view as to whether MobileTel has attempted to circumvent our rules, we see no reason to construe our rule in a way that defeats its underlying purpose. As we have recognized, BETRS service is inexpensive to provide in comparison to landline service,[51] and, accordingly, it would be relatively easy for carriers to obtain wireline eligibility in adjacent markets. The provision of BETRS in such circumstances would not be consistent with the rule's purpose of limiting the number of eligible applicants. Nor would it further the rule's underlying premise, which assumed that eligible carriers would be able to "rely on their expertise and knowledge about their individual service areas to more quickly make quality cellular service available to their communities."[52] Finally, it would not significantly further the objective of the BETRS service, which is to provide service to remote areas. For these reasons as well, we decline in these circumstances to make an exception to our eligibility rule.

CONCLUSION

27. For the reasons set forth above, we find that MobileTel is ineligible to apply for the Block B cellular frequencies in the captioned markets. Accordingly, we vacate the decision of the MSD in *MobileTel, Inc.*, and, pursuant to 47 C.F.R. § 22.20(a), dismiss the applica-

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[51] *Report and Order*, 3 FCC Rcd at 214.

[52] *Memorandum Opinion and Order on Reconsideration*, CC Docket No. 79-318, 89 FCC 2d 58, 71 (1982).

tions of MobileTel as unacceptable for filing. In light of our finding that MobileTel is not eligible to hold Block B licenses in the Louisiana 8 and 9 RSAs, we do not address the issues raised in Columbia's Motion for Evidentiary Investigation. Accordingly, we dismiss this motion as moot.

28. In addition, because MobileTel has commenced service in the Louisiana 8 and Louisiana 9 RSAs, we will grant MobileTel interim authority to continue operation until a qualified applicant is licensed and ready to begin service.[53] Granting such interim operating authority to MobileTel serves the public interest as lack of such authority would severely and immediately impact MobileTel's customers who would find themselves without cellular service. Moreover, we do not believe that alternatives, such as joint operation or third party operation are viable here in light of the inherent difficulties associated with joint interim management operations and the considerable amount of time and resources that would be necessary before a third party could be selected and commences operation. As such, for similar reasons as in *La Star* and *Metro Mobile CTS, Inc.*, we find that grant of interim operating authority to MobileTel pending the selection of another tentative selectee and the commencement of that selectee's operation, serves the public interest, The staff is instructed to award the licenses in accordance with the processing rules as they existed at the time of the Bureau's decision.[54] We also instruct the staff to conduct this licensing process expeditiously so that the period

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[53] *See Metro Mobile CTS, Inc.*, 8 FCC Rcd 8675 (1993), *aff'd sub nom., JAJ Cellular v. FCC*, 54 F.3d 834 (D.C. Cir. 1995); *La Star Cellular Telephone Company*, 4 FCC Rcd 3777 (1989), *aff'd*, 899 F.2d 1233 (D.C. Cir. 1990).

[54] The Wireless Telecommunications Bureau's recusal from this proceeding does not apply to the further processing of the remaining applications for these licenses. The Bureau, however, continues to be recused from participating in any future Commission deliberations concerning the issue of MobileTel's eligibility.

of interim operating authority will be for as short a period of time as possible.

ORDERING CLAUSES

29. Accordingly, IT IS ORDERED that the Order of the Mobile Services Division granting the applications of MobileTel, Inc., to construct and operate a cellular system on frequency Block B in the domestic public cellular radio telecommunications service to serve the Louisiana 8 and Louisiana 9 Rural Service Areas, IS HEREBY VACATED and the authorizations for those markets ARE HEREBY RESCINDED.

30. IT IS FURTHER ORDERED that the Motion to Dismiss With Prejudice filed by BellSouth Mobility, Inc. IS GRANTED and the Petition for Reconsideration and related pleadings filed against the grant to MobileTel, Inc. in the Louisiana 8 and Louisiana 9 Rural Service Areas ARE DISMISSED.

41. IT IS FURTHER ORDERED that Request for Approval of Settlement filed by Columbia Cellular, Inc. IS DENIED.

32. IT IS FURTHER ORDERED that the Petition for Reconsideration filed by Columbia Cellular, Inc. against the grant to MobileTel, Inc. in the Louisiana 8 and Louisiana 9 Rural Service Areas IS DISMISSED.

33. IT IS FURTHER ORDERED that the Motion for Full Evidentiary Investigation filed by Columbia Cellular, Inc. IS DISMISSED as moot.

34. IT IS FURTHER ORDERED that the Motion to Suspend Consideration of the Motion to Dismiss and Settlement Agreement IS DISMISSED as moot.

35. IT IS FURTHER ORDERED that MobileTel, Inc., IS GRANTED INTERIM AUTHORITY pursuant to 47 U.S.C. § 154(i) to operate the Block B cellular systems

in the Louisiana 8 and Louisiana 9 Rural Service Areas until a qualified applicant is licensed and ready to commence service.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM F. CATON
Acting Secretary

APPENDIX C

BEFORE -THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of

MOBILETEL, INC.

For authority to
construct and operate a
Domestic Public Cellular
Radio Telecommunications
Service on Frequency Block B
in the Louisiana 8—St. James
Rural Service Area

File No. 10538-CL-P-461-B-89

For authority to
construct and operate a
Domestic Public Cellular
Telecommunications Service
Radio on Frequency Block B
in the Louisiana 9—
Plaquemines Rural Service
Area

File No. 10539-CL-P-462-B-89

MEMORANDUM OPINION AND ORDER

Adopted: October 4, 1990; Released: October 11, 1990

By the Chief, Mobile Services Division:

I. BACKGROUND

1. On October 27, 1989, MobileTel, Inc. ("MobileTel") was named tentative selectee for the wireline Block B construction authorization for the Louisiana 8—St. James Rural Service Area ("RSA").[1] On December 1, 1989, MobileTel was named tentative selectee for the wireline Block B construction authorization for Louisiana 9—Plaquemines RSA.[2] BellSouth Mobility, Inc. ("BellSouth") and Columbia Cellular, Inc. ("Columbia") filed individual applications for the wireline Block B Louisiana 8—St. James RSA. Subsequent to the filing of these applications, BellSouth and Columbia entered into a partial settlement agreement forming Louisiana RSA No. 8 Limited Partnership ("St. James Petitioner") which has filed a petition to deny the application of MobileTel for the St. James RSA. BellSouth, a competing applicant in the Louisiana 9—Plaquemines RSA, has filed a petition to deny against the application of MobileTel for the Plaquemines RSA. Mobiletel has filed oppositions. By letter dated May 24, 1990, the Mobile Services Division ("MSD") requested further information regarding wireline eligibility from MobileTel, whose response was filed on July 18, 1990. On August 6, 1990, BellSouth submitted reply comments to Mobiletel's responses. Since the petitions to deny in the St. James and Plaquemines RSAs raise the same issues, we consolidate the above-captioned applications and resolve the issues in this Memorandum Opinion and Order.

II. CONTENTIONS OF THE PARTIES

2. In their petitions, St. James Petitioner and BellSouth ("Petitioners") argue that, at the time that MobileTel filed its application for the above-captioned markets, it was not qualified to be a wireline cellular applicant be-

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[1] Public Notice, Report No. CL-90-23 (released October 27, 1989).

[2] Public Notice, Report No. CL-90-55 (released December 1, 1989).

cause it was not providing landline telephone service in the St. James and Plaquemines RSAs. In support of this argument, Petitioners assert that Section 22.902(b) of the Commission's Rules requires that MobileTel, at the time its applications were filed, was providing landline basic exchange telephone service to the St. James and Plaquemine RSAs and that MobileTel's claim of wireline eligibility through its telephone company affiliate's provision of Basic Exchange Telecommunications Radio Service ("BETRS"), does not constitute the provision of public landline telephone service as required by the rules.

3. In opposition, MobileTel contends that its affiliate, Lafourche Telephone Company ("Lafourche"), like MobileTel, a wholly-owned subsidiary of SJI, Inc., is a certificated local exchange carrier authorized by the Louisiana Public Service Commission to provide basic switched telephone service in locations including the Plaquemines and St. James RSAs. Further, MobileTel asserts that for more than fifty years, Lafourche has provided basic local exchange telephone service to its customers in southeastern Louisiana some of whom live in remote wetland areas which make it impractical to use wire or cable facilities for the provision of basic service in these areas. Consequently, MobileTel argues, Lafourche decided in 1988 to integrate its local exchange network and provide remote customers in these RSAs with telephone service utilizing BETRS. For this BETRS service, customers use standard telephone equipment, and receive seven-digit telephone numbers which are listed in the same telephone directories as other subscribers and are generated from Lafourche central offices. Moreover, MobileTel asserts that the Louisiana Public Service Commission does not distinguish BETRS from public landline message telephone service and that Lafourche customers receive identical basic exchange telephone service regardless of whether the Lafourche "loop" to connect remote subscribers to its central offices utilizes wire, radio or fiber optic cable as a transmission medium.

III. DISCUSSION

4. The issue to be resolved in this case is whether, MobileTel is eligible to apply for and be granted Block B (wireline) licenses in the above-captioned RSA markets. Section 22.902(b) of the Commission's Rules provides, in pertinent part, that:

> . . . Common Carriers not also engaged in the business of affording public landline message telephone service will be assigned frequencies from Cellular System A. Common Carriers engaged directly or indirectly in the business of affording public landline message telephone service will be assigned frequencies from cellular System B in those areas in which they provide such landline service in some portion of the cellular market . . . .

Section 22.2 of the Commission's Rules defines wireline common carriers as "Common carriers which are in the business of providing landline local exchange telephone service." In adopting this definition, the Commission determined that the word "landline" was necessary in order to distinguish between radio common carriers and common carriers which are in the business of providing local exchange telephone service. *Revision and Update of Part 22 of the Public Mobile Radio Services Rules,* 95 FCC 2d 769, 772 (1983).

5. The separate allocation of frequencies mandated by Section 22.902(b) is known as the wireline set aside. In adopting this separate allocation scheme for cellular licensing, the Commission stated that it was convinced that the separate allocation is the most practical way to make cellular service available to the greatest amount of people in the most expeditious manner possible. *Cellular Communications Systems,* 86 FCC 2d 469, 488-89 (1981). In Part 22 services other than cellular, the Commission has permitted wireline companies to apply for wireline frequencies in any market, without regard to where they are doing business as a wireline. *Bonduel Telephone Co.,* 68

FCC 2d 497 (1978). However, in order to achieve its objective of rapid implementation of cellular service, the Commission rejected the *Bondeul* approach for wireline cellular applicants.

6. On reconsideration of *Cellular Communications Systems, supra*, the Commission reaffirmed its findings, stating that separate allocation constitutes the most practical way to achieve the goals of making quality cellular telephone service available to the public as rapidly as possible as well as promoting competition. *Cellular Communications Systems, (Order on Reconsideration)*, 89 FCC 2d 58, 70 (1982). The Commission concluded that it considered cellular service to be an extension of local exchange service, and expected that wireline carriers would be able to rely upon their expertise and knowledge of their respective service areas to make quality cellular service available to their communities in an expeditious manner. *Id.* at 71.

7. When the Commission decided to use lotteries for the selection of mutually exclusive cellular applications, it revisited the issue of the wireline set aside and decided to maintain the set aside in order to achieve its original goals and emphasized that it did not wish to prevent rural telephone companies from entering the cellular market. The Commission stated that it was concerned with the continued financial viability of small telephone companies which is necessary to achieve the Commission's goal of universal service to as many areas of the country as possible. In addition, the Commission stated that separate allocations, coupled with the wireline presence requirement of Section 22.902(b), has been effective in expediting the provision of cellular service to the public because the wireline presence requirement limits the number of mutually exclusive applications. *Cellular Lotteries*, 98 FCC 2d 175, 192-98 (1984).

8. Recently, the Commission reaffirmed the wireline set aside and again emphasized that among the reasons for adopting the set aside was that it would assure that

both large and small telephone companies would have an opportunity to participate in providing cellular service. *See Rules for Rural Cellular Service, (Order on Reconsideration)*, 2 FCC Rcd 3366, 3369 (1987).

9. In 1988, the Commission established a new radio service known as Basic Exchange Telecommunications Radio Service ("BETRS") which is defined in Section 22.2 of the Commission's Rules as a public message communication service between a central office and subscribers located in rural areas. *Report and Order*, 3 FCC Rcd 214 (1988). In *Report and Order*, the Commission stated the "BETRS is provided so that radio loops can take the place of (expensive) wire or cable to remote areas. It is intended to be an extension of intrastate basic exchange service." *Id.* at 217. With regard to the eligibility issue, the Commission stated that "[B]ecause BETRS is provided as an extension of basic exchange service, we will require that a service provider be a State certified local exchange carrier or, if not a certified LEC, have some form of permission from the State to provide basic exchange radio service." *Id.*

10. Louisiana is one of the states which do not require their Public Service Commission ("PSC") to issue certificates to carriers authorized to provide local exchange service. However, MobileTel, in its response to the MSD letter requesting information regarding its wireline eligibility, submitted letters from the Louisiana PSC which clearly state that Lafourche has been authorized to provide basic exchange telephone service in the areas which include the Plaquemines and St. James RSAs, and that in 1988, began providing local exchange service, by means of BETRS, to areas within these two RSAs. The Louisiana PSC further states that it does not distinguish BETRS from public landline message telephone service and that all Lafourche services are tariffed under the General Subscriber Services Tariff and carry the same monthly basic rate for local exchange services.

11. It is clear from the foregoing that Lafourche is an independent wireline telephone company authorized in Louisiana as a local exchange carrier to provide basic exchange telephone service in territories of Louisiana including the Plaquemines and St. James RSAs. In 1988, Lafourche began providing and still provides local exchange service, by means of BETRS, in the Plaquemines and St. James RSAs. As stated above, the Commission intended, in establishing this new radio service, that BETRS be an extension of intrastate basic exchange service and be provided so that radio loops can take the place of expensive landlines (via cable or wire) to remote areas. *Report and Order*, 3 FCC Rcd at 217. The clear intent of the Commission in later establishing BETRS was to facilitate the provision of basic exchange service to subscribers in remote areas by local exchange carriers like Lafourche. At the time that the Commission promulgated the eligibility requirement set forth in Section 22.902(b), BETRS was not a service under the rules and, therefore, was not specifically addressed in the wireline set aside scheme. Given the reason for adopting the wireline set aside and the reasons for establishing the BETRS service as an extension of basic exchange telephone service, we believe that the Commission's intent in establishing the wireline set aside would be to allow a wireline carrier which provides BETRS service to qualify for a Block B license. Given that MobileTel's affiliate, Lafourche, is undisputably a wireline carrier which provides basic exchange telephone service to customers in the St. James and Plaquemines RSAs, through BETRS as an extension of its wireline system, Section 22.902(b) permits MobileTel to file Block B cellular applications in these RSAs.

12. We recognize that a company providing only BETRS does not qualify an applicant as a wireline for purposes of Section 22.902(b). In this regard, Mobile-

Tel's eligibility is readily distinguishable from cases in which the applicant sought wireline eligibility based not on the provision of basic exchange service, but rather on the basis of providing paging or point-to-point microwave service. *See, e.g., Inquiry into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems, (Further Reconsideration Order)*, 90 FCC 2d 571, 578 (1982) (rejecting claim of wireline status based on provision of paging service); *The Offshore Telephone Company*, 3 FCC Rcd 4601 (1988) (rejecting claim of eligibility based on provision of point-to-point microwave service). However, where a company with permission from the State to provide basic exchange radio service or certificated as a local exchange carrier, chooses to use BETRS as an extension of its wireline basic exchange service, this election does not disqualify the local telephone company from filing for the Block B wireline frequencies for RSAs in which it provides BETRS service.

IV. CONCLUSION AND ORDERING CLAUSES

13. In view of the foregoing, we find that MobileTel meets the wireline eligibility standards of Section 22.902(b) of the Rules and is legally, technically, financially and otherwise qualified to be a Commission licensee. Further, we find that granting the pending applications for the Louisiana 8—St. James and Louisiana 9—Plaquemines RSAs would be in the public interest and promote the efficient provision of cellular services to the public.

14. Accordingly, IT IS ORDERED that the applications of MobileTel, Inc. (File Numbers 10538-CL-P-461-B-89 and 10539-CL-P-462-B-89) ARE GRANTED. This authorization does not include the right to any interference protection in any areas outside the Louisiana 8—St. James and Louisiana 9—Plaquemines RSAs and is also conditioned upon Mobiletel's coordinating with current and future co-channel licensee(s) in the area outside the Louisiana 8-St. James and Louisiana 9-Plaquemines RSAs.

The licensee herein is put on notice that in the event any current or future MSA/RSA licensee encounters interference from any 39 dBu extension(s), the licensee herein will have to change frequencies in those cell(s) or pull back their 39 dBu contour to eliminate the interference due to the extension. All other mutually exclusive applications in this market are hereby dismissed.

15. IT IS FURTHER ORDERED that the Petitions to Deny filed by BellSouth Mobility, Inc. on behalf of Columbia Cellular, Inc. and Louisiana RSA No. 8 Limited Partnership ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

GREGORY J. VOGT
Chief, Mobile Services Division
Common Carrier Bureau

APPENDIX D

[Filed Apr. 29, 1997]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 96-1327

MOBILETEL, INC.,
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee

COLUMBIA CELLULAR, INC. and
BELLSOUTH MOBILITY INC.,
Intervenors

Before: EDWARDS, *Chief Judge*, WALD and SENTELLE, *Circuit Judges.*

ORDER

Upon consideration of appellant's petition for rehearing filed April 21, 1997, it is ORDERED that the petition be denied.

MobileTel did not articulate the argument that it now claims this court overlooked until the oral argument, but our decision nevertheless adequately addressed this argument. Our decision included a reference to the Federal Communications Commission's decision in *Xerox Corporation*, 90 F.C.C. 2d 547 (1982), which MobileTel now claims we overlooked, in which we explained that the Commission's action under review was entirely consistent with *Xerox*, because in *Xerox* (as in the action under

review) the Commission had considered the policies underlying its regulations in order to determine how the regulations should be construed. *See MobileTel, Inc. v. F.C.C.*, 107 F.3d 888, 894-95 (D.C. Cir. 1997). Our decision also observed that the Commission had declined to extend eligibility for the set-aside that MobileTel sought to other technologies that were used in the provision of local service, indicating that the Commission had not (as MobileTel now claims) ignored its own policies and the technologies used to provide local service in deciding whether to make the set-aside available to particular service providers. *See id.* at 895-96.

Per Curiam

FOR THE COURT:
MARK J. LANGER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Supreme Court, U.S.
FILED
SEP 2 1997
CLERK

(2)

No. 97-189

In the Supreme Court of the United States

October Term, 1996

MOBILETEL, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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13 pp

LIST OF PARTIES TO THE PROCEEDING

Respondents BellSouth Mobility Inc ("BellSouth") and Columbia Cellular, Inc. ("Columbia") concur in the listing of the parties to the proceeding contained in the petition for a writ of *certiorari*.

BellSouth is a wholly-owned subsidiary of BellSouth Cellular Corp. ("BSCC"), which is a wholly-owned subsidiary of BellSouth Mobile Systems, Inc. ("BMSI"). BMSI is a wholly-owned subsidiary of BellSouth Enterprises, Inc. ("BSE"), which is a wholly-owned subsidiary of BellSouth Corporation, a Georgia corporation headquartered at 1155 Peachtree Street, N.E., Atlanta, Georgia 30367. BellSouth Corporation, in turn, is a publicly held corporation and has equity securities in the hands of the public. BellSouth Corporation's wholly-owned subsidiaries have issued debt securities to the public as obligations of BellSouth Telecommunications, Inc., Southern Bell Telephone and Telegraph Company, South Central Bell Telephone Company, BellSouth Capital Funding Corp., BellSouth Savings and Security ESOP Trust, and BellSouth Savings and Employee Stock Ownership Trust. *See* Corporate Disclosure Statement filed in D.C. Cir. Case No. 96-1327, September 18, 1996.

Columbia has no parent, subsidiary, or affiliated company that has issued shares or debt securities to the public. An affiliate of Columbia, Reserve Telephone Company, Inc., provides landline exchange service in a portion of St. John the Baptist Parish in Louisiana. *See* Corporate Disclosure Statement filed in D.C. Cir. Case No. 96-1327, September 18, 1996.

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In the Supreme Court of the United States

October Term, 1996

No. 97-189

MOBILETEL, INC.,

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v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents BellSouth Mobility Inc ("BellSouth") and Columbia Cellular, Inc. ("Columbia") hereby oppose the petition for a writ of *certiorari* to the United States Court of Appeals for the District of Columbia Circuit filed by MobileTel, Inc. ("MobileTel"). The petition seeks review of a judgment of the Court of Appeals that "easily" affirmed a decision of the Federal Communications Commission ("FCC" or "Commission") denying certain licenses to MobileTel on the ground that it was ineligble to apply for the licenses under its rules. BellSouth and Columbia were the other applicants for the licenses at issue and have formed a partnership to hold one of the two licenses.

OPINIONS BELOW

The relevant opinions and orders below are reproduced in the appendix to the petition. They are: *MobileTel, Inc. v. FCC,* 107 F.3d 888 (D.C. Cir. 1997) (App. 1a), *reh'g denied,* slip op. (D.C. Cir. Apr.

29, 1997) (unpublished) (App. 47a), *aff'g MobileTel, Inc.*, slip op. FCC 96-345, 4 Communications Reg. (P&F) 476, 1996 FCC LEXIS 4374 (Aug. 14, 1996) (App. 16a), *vacating MobileTel, Inc.*, 5 F.C.C.R. 5854 (Mob. Serv. Div. 1990) (App. 38a).

STATEMENT OF THE CASE

The FCC decision that was affirmed by the Court of Appeals involved the interpretation and application of an FCC rule. The rule at issue, 47 C.F.R. § 22.902(b) (1988), delineated two frequency blocks for cellular radio service and established the eligibility standards for applicants for the two blocks. Block A was reserved for companies "not also engaged in the business of affording public landline message telephone service," generally known as "non-wireline" carriers. Block B was reserved for companies "engaged directly or indirectly in the business of affording public landline message telephone service," or "wireline" carriers, and only "in those areas in which they provide such landline services in some portion of the cellular market."

The Petitioner, MobileTel, Inc. ("MobileTel"), is a wireline carrier, because it is a subsidiary of SJI, Inc. ("SJI"), the parent of Lafourche Telephone Company ("Lafourche"), which provides "public landline message telephone service" in certain areas of Louisiana. In particular, Lafourche provides landline telephone service in the southern part of the New Orleans cellular market and in the Houma-Thibodaux cellular market. Accordingly, Lafourche or an affiliate was eligible to apply for wireline cellular licenses in those markets.

No Lafourche affiliate applied for the New Orleans license when it was initially available, but SJI did apply for the Houma-Thibodaux license. It was awarded the Houma-Thibodaux license after successfully opposing a competing applicant's eligibility as a wireline carrier. SJI argued for the disqualification of Offshore Telephone Co. on the ground that Offshore did not provide landline telephone

service in the Houma-Thibodaux market.[1] Offshore provided only a microwave radiotelephone connection to its customers in that market. In response to the objections of MobileTel's parent, the FCC disqualified Offshore on the grounds that "[a]s a provider of radio service, Offshore does not comply with the plain meaning of the 'public *landline* service' requirement of Section 22.902(b) of the Rules."[2] But for this ruling, MobileTel would not hold the Houma-Thibodaux wireline license.[3]

In the instant case, the issue for the FCC was whether MobileTel was eligible for the B block frequencies in two specific cellular markets: Rural Service Areas designated as Louisiana 8-St. James ("LA-8") and Louisiana 9-Plaquemines ("LA-9"). The LA-8 cellular market consists of three parishes: St. James, St. John the Baptist, and St. Charles, all located to the west of New Orleans and northeast of the Houma-Thibodaux market. The LA-9 cellular market consists of Plaquemines parish, located to the southeast of New Orleans. Neither MobileTel nor its affiliates have telephone exchanges, pole lines, cables, or other conventional "landline" facilities for the provision of telephone service in either LA-8 or LA-9, and they do not serve any customers with wire- or cable-based telephone service in those markets.

MobileTel's claim to be eligible for the wireline licenses in these markets is premised solely upon the fact that it provides telephone service to a single customer location in each market by means of a radio link. Just before applying for the cellular licenses, Lafourche began serving just *one* telephone customer in each of these markets by radio, not by using wire lines. Lafourche did this by beaming a radio signal to the customer's premises from towers located at its telephone exchanges in Larose (in the Houma-Thibodaux market) and Grand Isle (in the New Orleans market), in each case several miles

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1 *Offshore Telephone Co.*, 2 F.C.C.R. 4575 (Mobile Services Div. 1987), *aff'd*, 3 F.C.C.R. 4601 (1988).

2 *Id.*, 3 F.C.C.R. at 4601 (emphasis in original).

3 MobileTel's parent, SJI, was named the licensee in 1987, after the staff's disqualification of Offshore. The license was subsequently transferred to MobileTel.

outside the boundaries of the LA-8 and LA-9 markets where the customers were supposedly being served. The LA-8 customer location was a vacation home in an unpopulated swampy area just across the border from the Houma-Thibodaux market, while the LA-9 customer location was an oil exploration platform in Barataria Bay, just beyond the border from the New Orleans market. Lafourche began providing this radiotelephone service *after* the FCC had ruled in the *Offshore* case that the provision of telephone service in a given market only by means of radio does not constitute the provision of landline telephone service in the market and does not qualify the company for the B block frequencies in that market.

The FCC unanimously determined that the radiotelephone service provided by Lafourche did not qualify MobileTel for the B block frequencies in LA-8 and LA-9 because it did not establish a "landline" presence in the relevant markets. It also found that the purposes underlying the eligibility rule would not be served by allowing MobileTel to apply. Finally, the Commission found MobileTel had clear notice of the eligibility requirements, citing *Offshore* and other decisions. (App. 16a.)

MobileTel appealed to the United States Court of Appeals for the District of Columbia Circuit, which "easily" affirmed the FCC's decision. (App. 1a, 12a.) The Court of Appeals found the case a completely unexceptional administrative licensing decision involving an agency's reasonable and foreseeable interpretation of its rules in accordance with their literal terms. The Court stated:

> In this case, MobileTel itself describes the Commission's construction of the term "landline" as "literalistic," . . . suggesting that MobileTel's notice argument is premised on the extraordinary assertion that a "good faith" applicant trying to give the regulation a "fair reading" would not have understood that the term "landline" was to be read "literally." What makes it even more implausible that MobileTel could have misunderstood the term "landline" is the fact that only two months before Lafourche set up BETRS links in St. James and Plaquemines, the Commission had announced in *In*

> *re Application of the Offshore Telephone Co.*, 3 FCC Rcd 4601 (1988), that the provision of exclusively *radio*-based service in an RSA does not render a company eligible for the "wireline set-aside" frequencies in that RSA. (MobileTel was even better situated to mark the significance of the *Offshore* decision than were other "good faith" readers of the Commission's regulation, because MobileTel's parent SJI, Inc. was a party to the *Offshore* case.)
>
> Because we believe a good faith prospective applicant for the Block B frequencies in the St. James and Plaquemines RSAs would, upon giving § 22.902(b) of the Commission's regulations a fair reading, have understood that the provision of only BETRS-based service in these RSAs would not create eligibility for these frequencies, we reject MobileTel's notice argument.

(App. 13a-14a.) The Court of Appeals issued its mandate on March 7, 1997.

MobileTel sought rehearing. On April 29, 1997, the Court of Appeals denied rehearing, indicating that:

> MobileTel did not articulate the argument that it now claims this court overlooked until the oral argument, but our decision nevertheless adequately addressed this argument.

(App. 47a.) MobileTel now seeks issuance of a writ of *certiorari*.

REASONS FOR DENYING THE WRIT

I.

MobileTel's petition for a writ of *certiorari* should be denied, in the first instance, because the question presented in the petition

cannot fairly be decided on the record of this case. MobileTel frames the question presented as follows:

> When a federal agency adopts a new analytical approach to determining whether a regulated entity falls into an existing regulatory classification, such as eligibility for licenses issued by the agency under its regulations, which approach causes substantial, irreparable harm to applicants deemed to be ineligible, does this Court's decision in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company*, 463 U.S. 29 (1983) and its progeny require the agency to at least acknowledge and support the departure with a reasoned explanation on the administrative record?

This question is not presented by the record here for the following reasons. First, the FCC did not "adopt[] a new analytical approach." It interpreted its regulation in precisely the same way it had interpreted the same regulation in a previous decision, *Offshore*. (App. 29a.) The Court of Appeals correctly observed that the case involved no departure from precedent. Second, the FCC provided a reasoned explanation for its interpretation that addressed its prior interpretations of the rule at issue and similar rules, as well as the purposes of such rules. (App. 27a-34a.) Third, no issue concerning the extension of *State Farm* and its progeny, which concern judicial review of rulemaking decisions, to adjudications was ever raised below by MobileTel[4] or was decided by the Court of Appeals.[5]

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[4] MobileTel did not cite *State Farm* in its brief or reply brief to the Court of Appeals, and accordingly the court's opinion did not address the extension of *State Farm* to adjudicative rule interpretations. The first time MobileTel cited *State Farm* to the Court of Appeals was in its petition for rehearing, where it relied on *State Farm* and other cases for the principle that an agency changing its course must provide a reasoned explanation. *See* MobileTel Petition for Rehearing at 4, 11 (filed April 21, 1997).

[5] The Court of Appeals did not need to address *State Farm* in its denial of rehearing because the court the FCC's decision was consistent with agency precedent.

Accordingly, the petition should be denied. *See* SUP. CT. R. 14.1(a), 14.4, 15.2.

II.

Assuming *arguendo* that this case involved a departure from prior rule interpretations, MobileTel's petition still fails to raise an issue of any consequence. MobileTel claims that this case presents an "important question" regarding "requir[ing] federal agencies to provide a reasoned explanation when adopting new or different interpretations of existing regulations." (Pet. 11.) There is no doubt, however, that when an agency changes course—whether by rule-making or rule interpretation—the courts require it to acknowledge that fact and provide a reasoned explanation. In fact, the leading cases cited by MobileTel demonstrate this point: *State Farm*, 463 U.S. at 42, 57 (requiring explanation when rule rescinded through rulemaking); *Atchison, Topeka, and Santa Fe Ry. Co. v. Wichita Board of Trade*, 412 U.S. 800, 808 (1973) (in adjudication, agency has "duty to explain its departure from prior norms . . . clearly so that the reviewing court can understand the basis of the agency's action"); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) (requiring "reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored"), *cert. denied*, 403 U.S. 923 (1971). MobileTel cites no inconsistent or inconclusive case law that suggests a need for clarification.[6] Accordingly, there is no important federal question or conflict among the circuits warranting grant of the petition.

Moreover, the Court of Appeals below did not depart from this principle, for the simple reason that there was no departure from prior interpretations that required an explanation. The only prior decision by the FCC interpreting the very same part of the same regulation was *Offshore*, in which the FCC reached precisely the same result as

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[6] MobileTel urges this Court to grant a writ of *certiorari* so as "to provide guidance to the Courts of Appeal [sic]" regarding the need for consistency or explanation with respect to rule interpretations in particular. (Pet. 16.) No such guidance is needed, however. MobileTel cites decisions from the First, Fifth, Seventh, and Ninth Circuits holding that agencies changing their prior intepretations of rules must provide a reasoned explanation, but no decisions to the contrary. (Pet. 15 & n.5 (citing cases).)

here. Not surprisingly, MobileTel's petition fails to cite *Offshore*, the one prior decision directly on point. It was *this* decision the Commission was obliged to follow, unless it had a reasoned explanation for doing otherwise. No other previous Commission decision involved the question of whether the provision of telephone service exclusively via radio technology instead of wire lines constituted "landline" telephone service, for purposes of wireline cellular eligibility under § 22.902(b). Accordingly, there was no departure from prior interpretations to explain.

MobileTel attempts to create an inconsistency by reciting numerous prior intepretations of the phrase "public landline message telephone service" that did not distinguish between radio and wire lines and focused on the simple provision of telephone exchange service. (Pet. 16-19.) In none of these cases, however, did the FCC consider the issue of wire- versus radio-based exchange service in construing the phrase, so the pre-*Offshore* decisions simply did not address the issue.[7] Moreover, the decisions cited by MobileTel as supposedly inconsistent did not involve a rule that granted a wireline company eligibility only "in those areas in which they provide *such landline services* in some portion of the cellular market," as was the case here.[8] Thus, the Commission did not depart from those previous decisions when it ruled on MobileTel's eligibility, but rather its decision took into account a factor that had not been present in the earlier decisions. Simply put, there was no inconsistency or change in interpretation that needed to be explained.

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[7] For example, in *Xerox Corp.*, 90 F.C.C.2d 547 (1982), the issue before the Commission was whether MCI, a long-distance telephone company, was engaged in the provision of public landline message telephone service. The Commission held that MCI was not, because it provided only long-distance, and not local exchange, telephone service. There is no indication in the order that the technology used to provide service was considered, but whether MCI used wire or radio technology would not have changed the result in that case, because it did not provide local exchange service, regardless of technology. The Court of Appeals actually found the Commission's decision "consistent with *Xerox*, because . . . (as in the action under review) the Commission had considered the policies underlying its regulations in order to determine how the regulations should be construed." (App. 48a.)

[8] 47 C.F.R. § 22.902(b) (1988).

CONCLUSION

For the reasons stated, the petition should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1996

MOBILETEL, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Until 1994, the Federal Communications Commission reserved one of the two cellular telephone licenses in each market for a company that provided "landline message telephone service" in "some portion of the cellular market." 47 C.F.R. 22.902(b) (1988). The question presented is whether the FCC properly interpreted its regulations relating to the "landline" set-aside when it ruled that a telephone company that provided service to a market only through radio links was not eligible for the "landline" license in that market.

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BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 107 F.3d 888. The opinion and order of the Federal Communications Commission (Pet. App. 16a-37a) is reported at 11 F.C.C.R. 19,098.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 1997. A petition for rehearing was denied on April 29, 1997. Pet. App. 47a-48a. The petition for a writ of certiorari was filed on July 28, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. When the Federal Communications Commission (FCC or Commission) established rules to govern the implementation of cellular telephone service in 1981, it divided the cellular spectrum into two frequency blocks, labelled "A" and "B." The Commission set aside the B-Block licenses for what it termed "wireline" applicants—*i.e.*, common carriers that provide "public landline message telephone service." 47 C.F.R. 22.902(b) (1988); see *Cellular Communications Systems*, 86 F.C.C.2d 469, 487, 490, 493 (1981) (*Cellular Order*) (referring to "wireline" applicants and blocks), modified, 89 F.C.C.2d 58 (1982) (*Cellular Reconsideration*), further modified, 90 F.C.C.2d 571 (1982), petition for review dismissed *sub nom. United States* v. *FCC*, No. 82-1526 (D.C. Cir. Mar. 3, 1983). The A-Block licenses were reserved exclusively for non-wireline applicants.

The wireline set-aside was intended to expedite service to the public by ensuring that one license in every market would be held either by AT&T (at that time still an integrated enterprise providing local service throughout much of the country) or by another local provider of landline exchange service. AT&T had developed cellular technology, and all of the local wireline companies had experience in managing telephone traffic and in designing and operating local switching networks. That technical expertise was expected to translate into prompt service. *Cellular Order*, 86 F.C.C.2d at 488-490; *Cellular Reconsideration*, 89 F.C.C.2d at 70.

In licensing other types of mobile services, the Commission had established wireline set-asides under which a wireline carrier was eligible to hold the

wireline license in any market, without regard to whether it provided wireline service in that market. See *In re Bonduel Telephone Co.*, 68 F.C.C.2d 497 (1978). In establishing the cellular rules, however, the Commission specifically limited the availability of B-Block licenses to wireline carriers that provide landline service in at least some portion of the relevant cellular market.[1] That approach was, in the Commission's view, "the best way to attain [the Commission's] goals of making cellular service available to the public as rapidly as feasible while still promoting competition to the extent possible." *Cellular Reconsideration*, 89 F.C.C.2d at 76. Because very few companies in each market would have the required local landline telephone presence, there would be little need for lengthy comparative proceedings to select the B-Block licensee, thus reducing delays in the introduction of service. *Cellular Order*, 86 F.C.C.2d at 490 & n.56.

In 1983, the Commission switched from a comparative hearing process to a lottery process for the selection of cellular licensees. In connection with that change the Commission reconsidered the desirability of the wireline set-aside, and decided to retain it. The Commission determined that eliminating the set-aside could adversely affect the provision of basic telephone service in rural areas, if local landline companies lost customers and revenue to a competing cellular carrier. In addition, the wireline set-aside rules

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[1] The relevant rule provided that "[c]ommon carriers engaged directly or indirectly in the business of affording public landline message telephone service will be assigned frequencies from cellular System B in those areas in which they provide such landline service in some portion of the cellular market." 47 C.F.R. 22.902(b) (1988).

had precluded small landline companies from holding licenses outside their landline areas, and the Commission concluded that opening the B-Block lotteries to any applicant would unfairly lower local companies' chances of winning the lottery in their own landline territories. Finally, by reducing the number of applicants for licenses, the set-aside and market-presence requirements had helped encourage settlement agreements among mutually exclusive applicants, thus speeding service to the public, and that benefit was expected to continue under a lottery licensing process. *Cellular Lottery Rulemaking*, 98 F.C.C.2d 175, 194-197 (1984), modified, *Cellular Lottery Reconsideration Order*, 101 F.C.C.2d 577 (1985), aff'd in relevant part *sub nom. Maxcell Telecom Plus, Inc.* v. *FCC*, 815 F.2d 1551 (D.C. Cir. 1987).

2. Petitioner MobileTel, Inc., is affiliated with Lafourche Telephone Company, a landline service provider in the Houma-Thibodaux, Louisiana, cellular market. That affiliation makes petitioner eligible to hold the B-Block wireline license in the Houma-Thibodaux market, which it does. In October 1988, petitioner applied for the B-Block licenses for two additional Louisiana cellular markets known as St. James and Plaquemines, which are adjacent to Houma-Thibodaux. Pet. App. 5a.

Lafourche does not provide any telephone service in the St. James and Plaquemines markets using actual wire connections. Shortly before applying for cellular licenses in those markets, Lafourche began providing radio-based telephone service to one subscriber in each market under a system known as Basic Exchange Telecommunications Radio Service (BETRS). Pet. App. 5a, 18a-19a. BETRS allows local exchange companies to use radio loops in place of wire

or cable to extend telephone service to remote or rugged areas where the installation of conventional hard-wired connections is prohibitively difficult or expensive. See *In re Basic Exchange Telecommunications Radio Service*, 3 F.C.C.R. 214 (1988). The Commission considers BETRS an alternative to "wireline" service, and the FCC rules in effect at the time Lafourche commenced service required applicants for BETRS licenses to show "why it [was] impracticable to provide the required communication service by means of wireline facilities." 47 C.F.R. 22.609(a) (1988).

Petitioner won the lottery for the St. James and Plaquemines B-Block licenses. The losing applicants asked the FCC to deny petitioner's applications on the ground that petitioner's BETRS radio links—its only presence in those two markets—did not satisfy the requirement that a B-Block licensee provide "landline service in some portion of the cellular market." 47 C.F.R. 22.902(b) (1988).

The FCC's mobile services division (MSD) initially rejected that objection and granted petitioner licenses for the two markets. Pet. App. 38a-46a. Because BETRS is "an extension of intrastate basic exchange service * * * [in which] radio loops can take the place of expensive landlines," the MSD reasoned that "the Commission's intent in establishing the wireline set aside would be to allow a wireline carrier which provides BETRS service to qualify for a Block B license." *Id.* at 44a.

The Commission reversed the MSD's order. Pet. App. 16a-37a. Rejecting the argument that the term "landline" as used in the eligibility rule included exclusively radio-based services such as BETRS, the Commission found it "evident" from other contexts

that it had "consistently use[d] the term to describe the provision of wireline service" as opposed to radio-based service. *Id.* at 27a. For example, the Commission's regulations define the term "wireline" carrier to mean one that provides "public landline telephone service," *id.* at 28a (citing 47 C.F.R. 22.99 (1996)), and the Commission had previously held that a B-Block applicant that provided telephone service in a market by means of radio links was not eligible for the set-aside license because "[a]s a provider of radio service, [it did] not comply with the plain meaning of the 'public *landline* service' requirement," *id.* at 29a (quoting *In re Offshore Telephone Co*, 3 F.C.C.R. 4601, 4601 (1988)) (emphasis supplied in *Offshore*). In keeping with *Offshore*, the Commission held that although "BETRS service is similar in functional respects to * * * local exchange wireline services," that similarity "does not affect the service's status as a radio service." *Id.* at 31a-32a.

The Commission also determined that the policies behind the wireline set-aside supported the rejection of petitioner's application for a B-Block license. Pet. App. 32a-34a. "A central purpose of [the Commission's] rule was to expedite the provision of cellular service to the public by reducing the number of applicants for one of the frequencies." *Id.* at 32a. Allowing radio-based carriers to apply for licenses would undermine that goal, whereas "by strictly adhering to the requirements of [its] rule, [the Commission could] strike the balance that is most consistent with the rule's multiple objectives." *Id.* at 33a-34a. Finally, the Commission expressed concern that, because "BETRS service is inexpensive to provide in comparison to landline service," *id.* at 34a, recognizing BETRS service as an alternative to land-

line service for purposes of the wireline set-aside "could invite carriers in adjacent markets to * * * provid[e] a very small amount of BETRS service in the relevant market [simply] in order to secure wireline eligibility," *ibid.*, without in fact furthering the goals of either the BETRS program or the set-aside.

3. The court of appeals affirmed the Commission's order. Pet. App. 1a-15a. The court recognized that it should "accept the agency's interpretation [of its own regulation] unless it is 'plainly wrong.'" *Id.* at 8a. Although it held that it could not resolve the case "solely on the basis of the 'plain meaning' of the word 'landline,'" *id.* at 10a, the court concluded that the policies underlying the set-aside supported the Commission's decision.

The court first observed (Pet. App. 10a-11a) that granting petitioner cellular licenses in the two markets at issue would not serve the goal of "benefit[ing] small telephone companies with a presence [in] a local market—companies with local expertise and experience, that could be squeezed out of business," because "the sum and substance of [petitioner's] 'presence' and 'experience' in the [relevant markets] was the extension of radio service to *one* customer in each [market]—and even these minimal excursions were set up just in time to support [petitioner's cellular license] applications." Barring applicants that provide only BETRS service in a market would also serve "[t]he Commission's additional rationale based on its desire to minimize the number of competing applicants for each [market]." *Id.* at 11a. Thus, "the Commission's construction of the term 'landline' [was] consistent with several of the[] policies" underlying the wireline set-aside, and "only the Commis-

sion may decide how much precedence particular policies will be granted when several are implicated." *Ibid.*

The court also rejected (Pet. App. 11a-12a) petitioner's arguments that the Commission's interpretation of its set-aside regulation was incompatible with its authorization of BETRS service; that declining to extend set-aside eligibility would "punish[]" carriers that set up BETRS links; and that the introduction of BETRS technology had "implied a radical alteration in the definitions of the terms 'landline' and 'wireline.'" Finally, the court held that the Commission's refusal to waive the B-Block eligibility requirements in petitioner's case was justified, "particularly in light of the fact that [petitioner's] extension of local service in the [relevant markets] was extremely limited in tenure and scope, and thus [petitioner] was distinctly not in the genre of companies that the Commission intended for the set-aside to benefit." *Id.* at 12a. For these reasons, the court found the Commission's interpretation of its regulations to be "reasonable and consistent with several of the Commission's relevant policies," and it "easily conclude[d]" that that interpretation "was not 'plainly wrong.'" *Ibid.*

In a petition for rehearing, petitioner argued that the Commission had improperly failed to follow the same interpretive approach to the wireline set-aside that it had taken in *In re Xerox Corp.*, 90 F.C.C.2d 547 (1982), and that it had "ignored its own policies and the technologies used to provide local service." See Pet. App. 47a-48a. In denying rehearing, the court of appeals noted that petitioner had not articulated its change-of-position contentions until oral argument, but that the court's opinion had

nonetheless addressed and rejected those contentions. *Ibid.*

ARGUMENT

1. Petitioner does not challenge the court of appeals' conclusion (Pet. App. 12a) that the FCC's interpretation of the term "landline," as used in the Commission's wireline set-aside eligibility regulation, is "reasonable and consistent with several of the Commission's relevant policies." Instead, petitioner argues (Pet. 11-20) that the court erroneously "confined its review" to that question, when it should instead have "require[d] an explanation" for an alleged "shift in approach" by the Commission in interpreting its regulation (Pet. 12). That claim does not warrant review.

To begin with, petitioner never made its present argument (that the Commission has impermissibly changed a prior position without "acknowledg[ing] the change and provid[ing] a reasoned explanation," Pet. 16) either to the Commission, as required by 47 U.S.C. 405(a) as a "condition precedent to judicial review," or in its briefs in the court of appeals. As the court noted in denying rehearing (Pet. App. 47a), petitioner did not articulate that contention until oral argument below. It is not appropriately elaborated for the first time in a petition for review by this Court.[2]

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[2] Although petitioner claims (Pet. 11 n.4) to have raised its argument before the court of appeals, it concedes (*ibid.*) that the cited portion of its brief merely discussed earlier Commission decisions "in the context of arguing that the Commission's [present] decision was 'plainly w[ro]ng.'" That is hardly the same thing. We note, for example, that petitioner's brief in the court of appeals does not cite *Motor Vehicles Manufacturers Association of the United States, Inc.* v. *State Farm Mutual*

In any event, petitioner's argument is without merit. As the court of appeals noted, the Commission's decision in *In re Offshore Telephone Co.*, 3 F.C.C.R. 4601 (1988), which was issued two months before petitioner's affiliate began its limited BETRS service in the markets at issue here, "announced * * * that the provision of exclusively *radio*-based service in [a relevant market] does not render a company eligible for the 'wireline set-aside.'" Pet. App. 14a. The Commission likewise pointed out, in its decision in this case, that "the core holding of *Offshore* rests on our determination that a provider of 'radio' service does not provide 'landline' service." *Id.* at 29a. Petitioner was presumably aware of the *Offshore* decision at the time it began BETRS service and applied for the licenses presently in dispute, because its parent company was a party to the case. *Id.* at 14a.[3] Thus, the decision in this case, far from being a dramatic and unexplained departure from prior practice, followed naturally, as both the Commission and the court of appeals recognized, from

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Automobile Insurance Co., 463 U.S. 29 (1983), on which its petition in this Court principally relies. Similarly, petitioner's appellate brief contains only a passing reference to the FCC's decision in *In re Xerox Corp.*, 90 F.C.C.2d 547 (1982), which petitioner now claims "exemplifies" (Pet. 16) the approach that the Commission is alleged to have abandoned.

[3] That is one reason why there is no merit to petitioner's claim (Pet. 14) that it has been treated unfairly because it was somehow misled into applying for the wrong type of license. The other is that, under 47 C.F.R. 22.902(b) (1988), a landline carrier was eligible to apply for cellular licenses only in markets in which it provided landline service. Thus, under no circumstances could petitioner (which was affiliated with a landline carrier) have applied for an A-Block license in the markets at issue here.

a decision issued eight years earlier—albeit one that petitioner fails to cite.

The decision in *In re Xerox Corp.*, 90 F.C.C.2d 547 (1982), on which petitioner relies (Pet. 17-19), is not to the contrary. The question in that case was whether a long-distance service provider was eligible to hold a non-wireline cellular license. The company did not own local telephone facilities, but its long-distance lines were connected to local facilities owned by local telephone companies. The Commission reviewed the history and policies behind the wireline set-aside and determined that the long-distance carrier did not provide landline exchange service for purposes of eligibility for the set-aside. 90 F.C.C.2d at 552-554.

Nothing in *Xerox* supports petitioner's contention (Pet. 19) that in this case the FCC impermissibly "abandoned" a different "decisionmaking approach" that it had used in the past. To the contrary, as the court of appeals observed, "in *Xerox* (as in the action under review) the Commission * * * considered the policies underlying its regulations in order to determine how the regulations should be construed." Pet. App. 47a-48a. *Xerox* did not discuss the technology used by the applicant, because in that case the technology had no bearing on the outcome. In this case, by contrast, the question before the Commission was whether the very limited BETRS service initiated by petitioner in the markets in question satisfied either the letter or the spirit of the Commission's wireline set-aside eligibility requirement.

Thus, the FCC did not depart from its own precedents in reaching its decision in this matter. See Pet. App. 27a-31a. Indeed, the court of appeals specifically recognized that the Commission's decision is consistent with policies the Commission had previously

articulated for its set-aside eligibility rule (*id.* at 10a-12a), and that "a good faith prospective applicant for the Block B frequencies [for which petitioner applied] would * * * have understood that the provision of only BETRS-based service * * * would not create eligibility" (*id.* at 14a). This case therefore raises no "important question concerning * * * the extent to which Article III courts should require federal agencies to provide a reasoned explanation when adopting new or different interpretations of existing regulations" (Pet. 11)—a proposition that neither the Commission nor the court of appeals questioned. See *Motor Vehicle Mfrs. Ass'n of the United States, Inc.* v. *State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 42 (1983).

2. In 1994, the Commission eliminated the wireline set-aside at issue in this case on the ground that it had become "obsolete and unnecessary." *In re Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, Report and Order*, 9 F.C.C.R. 6513, 6514 (1994). The Commission found that, by that time, the licensing process had been completed in "almost all" of the larger cellular markets and in "most" of the smaller ones. *Id.* at 6514 n.3. The "near completion of [the] initial cellular licensing process" had therefore "rendered * * * [the] initial cellular licensing rules obsolete." *Ibid.*; see also *In re Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, Notice of Proposed Rulemaking*, 7 F.C.C.R. 3658, 3672-3673 (1992) ("Once both eligible carriers * * * have been authorized, the purpose of the set-aside has been served and the maintenance of the set-aside rule is no longer justified."). The present dispute thus concerns the application of superseded rules to a single

remaining license applicant in circumstances that are extremely unlikely to recur. The matter is therefore of no continuing importance, and does not warrant review by this Court.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] Petitioner argues (Pet. 12) that the Commission "continues to employ * * * set-asides, most recently auctioning billions of dollars of spectrum to limited classes of eligible entities." Although petitioner does not elaborate, it may be referring to the set-aside for small businesses in a recent licensing proceeding for a new mobile communications service. See *Omnipoint Corp.* v. *FCC*, 78 F.3d 620, 626 (D.C. Cir. 1996) (describing small-business set-aside). That set-aside program implemented a specific statutory directive, see 47 U.S.C. 309(j)(3)(B), and it has nothing to do with the wireline set-aside at issue here.